IN THE

Supreme Court of the United States

October Term, 1947

No. 79

UNITED STATES OF AMERICA,
Appellant,

vs.

PARAMOUNT PICTURES, ET AL.,
Appellees.

MOTION OF THE SOCIETY OF INDEPENDENT MOTION PICTURE PRODUCERS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* (WITH BRIEF ANNEXED)

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Motion for Leave to File Brief on Behalf of *Amicus Curiae*

May it please the Court:

The undersigned, as counsel for the Society of Independent Motion Picture Producers, respectfully moves this Honorable Court for leave to file the annexed brief *amicus curiae* in this case.

1. The United States of America brought this suit against eight defendants and their affiliated companies, charging them with violations of Sections 1 and 2 of the Sherman Act. The Statutory Court below rendered an opinion and made findings of fact and conclusions of law, and final judgment was entered in accordance therewith on the 31st day of December, 1946.

2. The Government filed a petition for appeal in No. 79, which was allowed on February 21, 1947.

3. The members of the Society of Independent Motion Picture Producers are:

Constance Bennett,
Benedict Bogeaus,
Sidney Buchman,
William Cagney,
California Pictures, Inc.
(Howard Hughes),
Charles Chaplin,
Bing Crosby,
Walt Disney,
Federal Films, Inc.
(Boris Morris-William LeBaron),
Edward A. Golden,
Samuel Goldwyn,
Seymour Nebenzal,
Rainbow Productions, Inc.
(Leo McCarey),
Hal Roach,
Charles R. Rogers,
Edward Small,
Andrew Stone,
Story Productions Inc.
(Armand Deutsch),
Hunt Stromberg,
Vanguard Films, Inc.
(David O. Selznick),
Walter Wanger.

4. The members of the Society are all independent producers and are persons or entities who not only dominate financially the production of their own pictures but who have the right to control the distribution thereof. Mr. Keough, a principal officer of the defendant Paramount,

testifying in this action, said: "The independent producer usually is the best and most talented man, whether he be a producer or a director or sometimes a writer or sometimes a star, man or woman, and for one reason or another, good to themselves, they go into independent production and nobody has any interest in their venture except as they perhaps provide financing for them." (Record, p. 910; Sten. Minutes, 1269.)

Reference herewith is made to the Society's proposed brief wherein the Society's position has been set forth in full and the effect of the decree on its members as independent producers of motion pictures has been set forth.

5. In the spring of 1945 the Society of Independent Motion Picture Producers made application before Judge Goddard, then presiding alone, to file a brief *amicus* on the motion brought by the Government for a preliminary injunction against unreasonable clearances pending the trial. This application so to file was opposed by the defendants and after oral argument Judge Goddard granted leave to the Society to file a brief *amicus* and such brief was filed.

6. On or about the 21st day of October, 1946, after the opinion of the Statutory Court below had been handed down and on a day set for argument on the decree the Society was granted leave among others to file a brief *amicus* setting forth its position on the proposed decree. Such brief was duly filed and counsel for the Society argued thereon in open court.

7. On or about March 3, 1947 counsel for the Society wrote to the attorneys for all of the defendants and to the Department of Justice representing the United States

of America, requesting consent to file a brief *amicus* in connection with this appeal, and thus more than eight months notice has been given.

8. The Department of Justice, under date of March 5, 1947, responded immediately, granting consent to the filing of a brief by the Society as *amicus curiae*.

9. On October 17, 1947 page proof of the Society's proposed brief was sent to each of the attorneys for the defendants, again requesting consent on behalf of the Society to file a brief.

10. On November 20, 1947 the final brief was mailed to the attorneys for all of the defendants. This brief differed from the page proof previously sent to the attorneys for the defendants only in very minor respects, mostly typographical. The advices we received from all of the parties are as follows:

As to the United States of America—
Consented on March 5, 1947.

A. The following defendants declined:

(1) Paramount Pictures, Inc. and its subsidiary, Paramount Film Distributing Corporation.

(2) Radio-Keith-Orpheum Corporation and its subsidiaries R.K.O. Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, R.K.O. Proctor Corporation, R.K.O. Midwest Corporation.

(3) Loew's, Incorporated, by its attorneys, declined and wrote:

"After carefully considering the brief which you have prepared, I am forced to conclude

that it is not limited to the facts and argument presented on the present record. Therefore I regret that on behalf of the defendant Loew's, Incorporated whom I represent, I cannot consent to the filing of this brief."

There was no indication by counsel for Loew's, Incorporated as to what part of the Society's proposed brief in its judgment goes outside the record. We respectfully submit that such judgment is invalid.

(4) Columbia Pictures Corporation and its subsidiaries Screen Gems, Inc., Columbia Pictures of Louisiana, Inc.

(5) Universal Corporation and its subsidiaries Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Big U Film Exchange, Inc.

(6) United Artists Corporation.

B. The following defendants have declined by failure to respond to the Society's request:

(1) Warner Brothers Pictures, Inc. and its subsidiaries Warner Brothers Circuit Management Corporation.

(2) Twentieth Century-Fox Film Corporation and its subsidiary National Theatres Corporation.

(3) On information and belief, the American Theaters Association has intervened in this proceeding.

11. The Statutory Court in its opinion and decree laid its emphasis on the effect of the defendants' practices upon the independent exhibitor. The Society of Independent Motion Picture Producers believes that the defendants'

concentration of power constitutes a peril not only to the independent exhibitor but to the independent producer as well and, furthermore, that such concentration of power constitutes a menace to the motion picture industry as a whole, impinging upon the rights of the movie-going public, protected by the First Amendment. It is the contention of the Society that the decree as shaped by the court below is not adequate to restore competition in that it fails to go to the root of the evil, namely, theater ownership by the five major defendants. The Society additionally maintains that the independent producer is entitled to a clarification of the decree so that independent producers, not parties to the action and not guilty of any monopoly practices, will be permitted to distribute their pictures without carrying the burden of the restrictions in the decree directed only to the defendants.

These impacts on the independent motion picture producers and upon the movie-going public are discussed in the attached *amicus* brief. Although imbedded in the record in this action, neither the Government nor the defendants have heretofore touched upon them more than incidentally. Accordingly, we believe that the attached brief will be of assistance to the Court to the extent that it illuminates aspects of the litigation which are not developed in the briefs of the parties directly affected.

12. Although by reason of the foregoing circumstances, consent of all parties to the litigation has not been obtained as provided in Rule 27, subd. 9 of the Rules of this Court, it is respectfully submitted that the present case affords an appropriate occasion for the exercise of this Court's discretion and undoubted power to receive the Society's *amicus* brief annexed hereto.

We therefore respectfully urge that the Court grant leave to file the annexed brief which is made part of this motion, on behalf of the Society of Independent Motion Picture Producers as *amicus curiae*.

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BRIEF FOR THE SOCIETY OF INDEPENDENT MOTION PICTURE PRODUCERS AS *AMICUS CURIAE*

Opinion Below, Jurisdiction, Statute Involved

The Court's attention is respectfully directed to the Government's brief, which fully sets forth the above.

Statement

This brief is filed on behalf of the Society of Independent Motion Picture Producers to present the position of the independent producers, in aid of this court in reviewing the decision and decree of the court below. The

Society appeared before the District Court as *amicus curiae* in connection with the framing of the decree and on a previous preliminary proceeding before Judge Goddard.

A. *The Society*

The Society of Independent Motion Picture Producers, hereinafter referred to as the "Society" or the "Independent Producers," is a membership corporation organized under the laws of California for the purpose of furthering the art of motion picture production, and protecting the interests of the independent (as opposed to the majors and their subsidiaries) producers of motion pictures. The president of the Society is Donald M. Nelson, and its membership includes: Constance Bennett, Benedict Bogeaus, Sidney Buchman, William Cagney, California Pictures, Inc. (Howard Hughes), Charles Chaplin, Bing Crosby, Walt Disney, Federal Films Inc. (Boris Morris-William LeBaron), Edward A. Golden, Samuel Goldwyn, Seymour Nebenzal, Rainbow Productions, Inc. (Leo McCarey), Hal Roach, Charles R. Rogers, Edward Small, Andrew Stone, Story Productions, Inc. (Armand Deutsch), Hunt Stromberg, Vanguard Films, Inc. (David O. Selznick), Walter Wanger.

Generally speaking, the Society's members are engaged in independently and separately producing motion pictures. Excluding those made by the eight defendants, the independent producers make substantially the balance of all features in the United States. Their productions are normally individually financed either by their own personal capital or by private financing from banks or other lending institutions or individuals.

B. *The Independent Producer*

The District Court defined an independent producer (in exclusionary terms) as a producer who is not a defendant, or a subsidiary or affiliate of a defendant.[1] Affirmatively, however, and more realistically, an independent producer is one who not only dominates financially the production of his own pictures, but who has the right to control the distribution thereof, and does not restrict the market by either the ownership of theaters or by acting in concert with others.

Because of the domination by the defendants of the market, the independent producers have had no alternative but to distribute their product through the defendants—any one of the five who have been found to have endangered the market by theater ownership, or one of the three who, although they do not own theaters, have been found guilty of restricting the market by patterns of behavior stemming from horizontal combinations. The independent producer has generally distributed through United Artists and in some few instances through R.K.O.

The unique position of the independent producer in the motion picture industry has been accurately described by Mr. Keough,[2] a principal officer of the defendant Paramount: "The independent producer usually is the best and most talented man, whether he be a producer or a director or sometimes a writer or sometimes a star, man or woman, and for one reason or another, good to themselves, they go

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[1] 66 F. Supp. 323, 333.

[2] Austin C. Keogh, a member of the Board of Directors, Vice President, Secretary and General Counsel of Paramount Pictures, Inc. gave the above testimony in open court in response to a question by counsel for Paramount.

into independent production and nobody has any interest in their venture except as they perhaps provide financing for them." (Record, p. 910; Sten. Minutes, 1269.)

As Mr. Keough indicated, the independent producer has come to represent the best in the motion picture industry. He is in a real sense the best product of a competitive system, for it must be remembered that the independent cannot rely either on the ownership of vast retail outlets for the marketing of his pictures, or on monopolistic accords such as were found to exist among the defendants. Obviously, therefore, the independent producer of two or three pictures a year has a deeper concern with the merits of his products and a keener eye to public opinion and public acceptance than does the producer of twenty or more pictures, who not only can average out his profits and losses, but who is cushioned against potential production losses by the income from the theaters he owns.

Furthermore, since advances and innovations in the motion picture art are more likely to flow from the studios engaged in producing "custom made" films than from those producing films of a more "mass production" character, the economic health of the independent producer becomes a matter of real concern to the public.

On a quantitative basis, the total number of pictures independently produced by members of the Society is approximately equal to the total production of any one of the "majors".

Finally, to the extent that the independent producers are surviving at all in marketing their product despite the restrictive trade practices and attempts at monopolization of the defendants, they represent a real—perhaps the only real—competitive force in the film industry as contrasted with the defendants who have been found in substantial respects to be acting in monopolistic accord.

C. *The Stake of the Independent Producers in this Decree*

None of the Society's members is a party to the instant suit. None of them exercises any actual or potential power over the motion picture market by ownership or leasing of theaters. None of them has been accused or found guilty of engaging in any unlawful trade practices or attempts to monopolize.

Since the defendants dominate the distribution and the five major defendants dominate the exhibition of motion pictures in the United States, the decree of the court below necessarily deals with the functioning of the industry as a whole, and serves as a blueprint for its operation. Although the strictures made applicable to the defendants by reason of their theater holdings and horizontal trade practices ought, therefore, not to be applicable to non-theater owning independent producers free of guilt, the independent who must of economic necessity distribute through one of the defendants will be affected by all such restrictive provisions in the decree.

Because of the broad scope of the decree, the court below by silence has thus caused irreparable injury to independent producers. Actually, the court's failure affirmatively to protect the independent producers places them in even a worse competitive position vis-a-vis the defendants than they had occupied prior to the institution of the present action in that some in the industry will not bother to differentiate between defendants who alone are bound by the decree and innocent parties as are the independent producers.

The Society believes that in order to avert unintended and grave injury to its members, and in order effectively to re-establish the conditions of an open competitive mar-

ket for motion pictures and obtain adequate screen playing time for all worthwhile products and in the interests of the consuming public, the modifications and clarification of the decree it requests should be granted.

D. The Position of the Independent Producer

The independent producer requests modification or clarification of the decree in three essential respects:

(1) The decree should be modified so as to provide for an order directing divestiture of all theaters owned by defendants, and their sale on the open market, that is, dissolution of theater chains by sale to such buyers and in such a manner as will be consistent with the antitrust laws, and will restore competition to the industry.

(2) The decree should be clarified so as not to cast any shadow of doubt on the right of bona fide independents to market their pictures on terms acceptable to exhibitors and to include provisions for clearance, run and price maintenance in the licensing of their own products through the defendants where the independent producer is not guilty of horizontal accords, and does not own any theaters.

(3) The decree should affirmatively state that road shows are free from any restrictions thereon, at least so as to make it clear that the rights of independent producers with respect thereto shall not be interfered with.

POINT I

Nothing short of complete divorcement of exhibition from distribution and dissolution of defendants' exhibition chains will suffice to restore an open competitive market.

The court below found that the defendants' distributor-exhibitor combinations were guilty of monopolization, were destructive of competition, and restrained trade in violation of Section 1 of the Sherman Act. It is the contention of the Society that nothing short of divestiture of theater ownership and dissolution of defendants' exhibitors' chains will restore competition and a free market to the industry.

The District Court rejected "total divestiture" as a remedy on the grounds: (1) It "would be injurious to the corporations concerned"; (2) it was unnecessary "at the present time", since the public interest could be protected by mere injunctive relief against the objectionable trade practices and by setting up under the aegis of the court an entirely novel and untried system of marketing of films; and (3) because the defendant exhibitors operated their theaters with "experience and skill" and new supplanting independent exhibitors would be "unlikely for some years" to equal that experience and skill.

(1) *The "Injury" to Defendants*

The statutory court's concern with the argument that divestiture might prove injurious to these defendants, condemned by it for violating the Sherman Act, is based upon a fundamental misconception of the duty of a court of

equity to grant adequate relief for infringement of the antitrust laws. Whether or not such relief would be injurious to guilty defendants is irrelevant. The primary consideration is to fashion a decree which will effectively serve to carry out the purpose of the Act, i. e., to restore competitive conditions to the industry.

If divestiture will be a burden to the defendants, it is a burden which they who violated the law must carry. They cannot now be heard to complain.

In the *Crescent Amusement* case, 323 U. S. 173, the same argument was advanced by the defendants against the divestiture provisions of that decree. This court there held that (p. 189):

> "Those who violate the act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience. * * * Hence, we do not think the District Court abused its discretion in failing to limit the relief to an injunction against future violations. There is no reason why the protection of the public interest should depend solely on that somewhat cumbersome procedure when another effective one is available."

The fact situation before the Court in the *Crescent* case was, of course, strikingly analogous to one facet of the situation presented by the instant case, and the language of the Court above may fully and accurately be applied in that respect to the instant case.

More recently, in the *National Lead* case, (June 1947), 91 L. Ed. (S. Ct.) 1438, 1463 (1947), Mr. Justice Douglas observed in a dissenting opinion that:

> "The task of putting an end to monopolistic practices and restoring competition is one of magnitude and complexity; Congress has authorized use of the broadest powers of equity to cope with it. * * * And its powers under the antitrust laws, though not spe-

cifically enumerated, are ample to thwart the plans of those who would build illegal empires, no matter how imaginative their undertakings or subtle their techniques. *The power of the court is not limited to the restraint of future transgressions. The impairment of property rights is no barrier to the fashioning of a decree which will grant effective relief. United States* v. *Union P. R. Co.*, 226 U. S. 470, 476, 477, 57 L. ed. 306, 308, 309, 33 S. Ct. 162. *Divestiture or dissolution may be ordered in spite of hardship, inconvenience, or loss. United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189, 89 L. ed. 160, 171, 65 S. Ct. 254. Devices or instrumentalities which may be used for legitimate ends may nevertheless be outlawed entirely where they have been employed to build the monopoly or to create the restraint of trade. *United States* v. *Crescent Amusement Co., supra* (323 U. S., pp. 187, 188, 89 L. ed. 170, 171, 65 S. Ct. 254). *For the aim of the decree is not only to prevent a repetition of the unlawful practice but to undo what was done, to neutralize power unlawfully acquired, to prevent the defendants from acquiring any of the fruits of the condemned project. Standard Oil Co.* v. *United States*, 221 U. S. 1, 78, 55 L. ed. 619, 652, 31 S. Ct. 502, 34 LRA NS 834, Ann. Cas. 1912D 734." (Italics added.)

Mr. Justice Douglas went on to say:

"But beyond that is the effect on the industry. Here defendants have been in a commanding and impregnable position. They have dominated the field and suppressed competition. If competition is to be restored strong measures must be adopted to provide the maximum opportunity for new ventures to compete with the established giants of the industry."

Although in the *National Lead* case the District Court refused to grant divestiture as a remedy, this Court expressly rested its refusal on the theory that, under the

particular facts of that case, divestiture would not improve the competitive pattern of the industry.

> "Presumably, the requested divestiture would be for the purpose of providing four instead of two independent major competing plants in the titanium pigment industry. However, there is no showing whether or not the two licensees * * * may not be able to develop, under the decree, even more substantial competition against National Lead and Dupont than would new concerns operating the divested plants * * *" (at 1456).

The Court pointed out that divestiture in that particular case would amount only to divesting each of the two largest competitors of one of its principal plants.

The defendants can thus find no comfort in attempting to analogize the *National Lead* case to the case at bar. It would seem that the opinion of Mr. Justice Douglas is clearly appropriate here and it is submitted that the majority of the Court would adopt the rationale of the dissent of Mr. Justice Douglas as applied to the facts in the instant case.

We now turn to the second reason advanced by the court for refusing to grant divestiture, *i.e.* that divestiture was not a "necessary" remedy "at the present time", and that the public interest could adequately be protected by mere injunctive relief against certain specified trade practices when coupled with auction bidding as superimposed on the industry by the court below.

(2) *The "Necessity" of Divestiture and the Public Interest*

The record demonstrates a compelling need for relief by way of divestiture. The adequacy of a decree in an antitrust suit is measured by its effectiveness in restoring

competition, in dissipating the consequences of restraint and monopolization, and in thereby serving and protecting the public interest.

In the instant case, the statutory court has found the defendants guilty of attempting to monopolize, of erecting artificial barriers to free and open competition, and of engendering predatory practices which stifled competition. The industry in which these illegal acts were committed is a "communication of ideas" industry,—an industry charged not only with the function of entertaining but of enlightening, educating, and informing the people as well.[3] The peril to our continued existence as a democracy springing from the threat of control of so vital an industry by an aggregate of economic power in the hands of a few is obvious. Certainly if we are to be zealous in protecting freedom of the press and of the radio, we must be no less vigilant in assuring a free, open and competitive movie industry. The significant character of the industry here involved and the deep public interest constitute a graver threat than in the case of almost any other industry. In the words of Mr. Justice Frankfurter we are dealing not with "peanuts and potatoes" but with ideas and opinions —with the very life-stream of a democracy—and the courts in such a case, as distinguished from all others, are doubly charged with the positive duty of granting complete and stringent and effective relief.

The only remedy that will serve the purpose, the only relief that will effectively restore economic freedom to this

[3] "The motion picture commenced as a novel and pleasing type of entertainment but it has evolved into an important social and cultural force. In some senses it provides a common denominator to the feelings and aspirations of an entire people. Its importance must then be measured in terms other than the conventional one of dollars and cents". Evans & Bertrand, **The Motion Picture Industry: A Pattern** of Control, T.N.E.C. Monograph 43, at p. 56.

important industry, is divestiture. In concerning itself with the inconvenience to the defendants (discussed *supra*) and with the defendants' qualms about the "necessity" for divestiture, the court below not only overlooked the vital character of the industry involved, but also misconceived the import of the evidence presented by the government. For the record amply demonstrates that the trade practices outlawed by the court's decree were but symptomatic of a deeper fault—the fusion of highly integrated horizontal and vertical combinations of the defendant distributor-exhibitors, arising out of their theater-ownership. Common control, unity of purpose, and unity of action, springing from ownership of theaters made the conspiracy efficient and dangerous.

It follows, therefore, that because (a) the highly significant character of the motion picture industry makes it doubly important to keep it a free industry, both for statutory and constitutional reasons, and (b) the root of the threat to competition in that industry lies in the ownership of the theaters by defendants, the only adequate remedy is divestiture. The statutory court, in refusing to grant such relief, after finding infringement of the Sherman Act, failed thereby to grant the only sufficient, and necessary, remedy.

(a) The Vital Character of the Industry and the First Amendment

As has been indicated above, we are dealing here with a "First Amendment commodity". Motion pictures cannot be treated differently from the radio or the press when the Sherman Act is involved. There can be little doubt that today this Court would apply the First Amendment to pro-

tect the freedom of the screen as well as the freedom of the air and the freedom of the press.[4]

The Court has already indicated its great concern as to the standards to be applied to two "First Amendment commodities," namely, radio and the press, when threatened with monopoly and restrictive trade practices. Thus, Mr. Justice Black, writing for the majority in *United States of America* v. *Associated Press*, 326 U. S. 1, 20, said:

> "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of opinion from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. *Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combines a refuge if they impose restraints upon that constitutionally guaranteed freedom.*" (Italics added.)

In that same case, Mr. Justice Frankfurter observed that (p. 28):

> "Truth and understanding are not wares like peanuts and potatoes. And so, *the incidence of restraints upon the promotion of truths through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.* I find myself entirely in agreement with Judge Learned Hand that 'neither exclusively, nor even primarily are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news

[4] Professor Chafee in his treatise "Free Speech in the United States" (1942 Ed.) said (p. 534): "All the objections to a press censorship apply as well to film censorship, especially in an age when more persons probably go to the movies than read books." (See also, page 535.)

from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'" (Italics added.)

The words of Mr. Justice Murphy, in the radio monopoly case, appraising the importance of radio broadcasting (with which appraisal the majority, of course, was not in disagreement) may be applied in *haec verba* to motion pictures:

"Although radio broadcasting [*the motion picture*] like the press is generally conducted on a commercial basis, it is not an ordinary business activity like the selling of securities or the marketing of electrical power. In the dissemination of information and opinion, radio [*the motion picture*] has assumed a position of commanding importance, rivalling the press and the pulpit * * * because of its vast potentialities as a medium of communication, discussion and propaganda the character and extent of control that should be exercised over it by the government is a matter of deep and vital concern." *National Broadcasting Company* v. *United States*, 319 U. S. 190, 228 (1943).

Surely no court can find a significant distinction between Bob Hope over the radio, Bob Hope in the movies and Bob Hope between the covers of the book, I Never Left Home; between the weekly summary of the news in Time Magazine as compared with the motion picture March of Time and the same March of Time over the air; between Life With Father as a best selling magazine story and Life With Father as a best selling motion picture;

between the story of Woodrow Wilson as it appears between the covers of a book and the story of Woodrow Wilson as it is depicted on the screen; between a newscast, a newspaper, and a newsreel.

There is, therefore, no justification, in logic, reason or law, for treating motion pictures any differently from radio and the press. And where there is danger of monopolistic control over any one of these media of communication, not only are the antitrust laws brought into play, but the Constitution as well.

For in terms of the radio, the press, and the movies, the constitutional guarantees of free speech and free press have meaning only if there exists the greatest possible diversity of control over these three pipe-lines into the national market-place of thought. Concentrated control of these opinion-forming information-disseminating sources may well, as here, frustrate the vital guarantees of the First Amendment. For these reasons, those who traffic in ideas must be held to the highest standards of competitive behavior and no regard should be given in this day and age to the argument that the movies are merely entertainment as if such entertainment could ever be divorced from its educational impact.

It must be remembered that the primary public interest lies not in the direction of bigger and better equipped theaters but rather in greater diversification, and in a greater choice of motion pictures. As in radio and the press, the public interest can best be served by maintaining free and open channels carrying new, diverse, antagonistic, and more ideas to the market-place. This is the valid essence of free enterprise.

The court below, therefore, erred in denying the remedy of divestiture. Especially is this so, since the record amply demonstrates that such relief would be the only effective relief.

(b) The Root of the Evil Is the Economic Power Stemming from Theater Ownership.

The court below, apparently convinced of the existence of a monopoly but only in the form of monopolistic horizontal trade practices which it thought could be excised from the industry pattern, misconceived the import of some of the evidence offered by the Government. The Statutory Court said (66 Fed. Sup. 323, 353):

> "In the year 1945 there were about 18,076 motion picture theatres in the United States, of which the five major defendants had interests in 3,137, or 17.35%."
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> • • •
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> "It would seem unlikely that theatre owners having an aggregate interest of little more than one-sixth of all the theatres in the United States are exercising such a monopoly of the motion picture business that they should be subjected to the drastic remedy of complete divestiture in order to effect a proper degree to free competition. It is only in certain localities, and not in general, that an ownership of even first run theatres approximates monopolistic existence."

Despite the above, the fact (as supported by the record) remains that the dominant position of the defendants is the result of a geometric cumulation of power flowing from (1) their ownership of key theaters; (2) their domination of the distribution level, and (3) their horizontal agreements and other restrictive trade practices. It is, however, the ownership of theaters which plays the decisive role in the entire pattern of controls and is the springboard for accords on distribution. The deals made at distribution levels take on reality only because the deals relate to theaters owned by the defendants. Any independent who wishes to survive can do so only on defendants' terms, and even then, only as a "second-class

citizen" in the industry. That the independent producer survives at all is a great compliment to his product which can only be exhibited in today's market controlled by the defendants.

The most important item of evidence in the record[5] which must be considered in connection with the court's hypothesis and which was completely overlooked, thereby rendering the court's conclusion fallacious, is that the 3,137 theaters owned by the five major defendants produce more than 45% of the United States' gross return of a given picture. (See Appendix for complete chart, Table A, supporting the foregoing facts and constructed from record evidence.)

In other words, the five major defendants themselves, in one-sixth of all the theaters in the United States, have obtained a superior economic strategic position over all other producers by thus assuring to themselves playing time in theaters substantially guaranteeing more than 45% of the entire domestic return of the picture. The facts become even more significant when further broken down. For the most part the five major defendants have confined their theater holdings to the larger populated cities, where they generally control the first run theaters. In all but five of the forty-nine cities with populations from 100,000 to 200,000 (for the 1943-1944 season) first run rentals accounted for as high as from 70% to 90% of the total theater rentals in the city (Exhibit F-21). *This is the real power of the five major defendants.* They control the big theaters of this country, producing the lion's share of the gross return of most pictures. This power remains, assuming that every monopolistic horizontal trade practice struck down by the statutory court is sustained by

[5] Source: Defendants' answers to interrogatory No. 3, 1945. Exhibits: 95—R.K.O.; 40—Fox; 125—Warners; 81—Paramount; 56—Loew's; 138—Columbia; 144—United Artists; 362—Universal.

this Court. This power goes even beyond the startling test of dollars because these theaters owned by the five major defendants are the choice theaters in the land and are looked upon as setting the national pattern of exhibition of all motion pictures in the United States, the influence of which is carried down through exhibition at all subsequent runs and at all prices.

The independent producer does not own theaters nor does he have a distribution system. He exists as the only creative force competitive to the defendants. He will continue to operate under a constant burden so long as the defendants continue to own and run their own theaters. For without divestiture, the defendants will be left with as much power to control the market as they possessed before the decree. In the *Schine* and *Crescent* cases, the courts have condemned analogous power through theater ownership even though not wedded to distribution controls. We, of course, are not concerned with the so called "show case" theater where a producer may legitimately show his own product exclusively at first run.

Whether there be future horizontal agreements or not, the simple fact remains that if the major defendants are permitted to retain ownership of theaters which form a part of the bloc of 3,137, each defendant will inevitably, as in the past, use its part of that bloc for the benefit of itself and the four other theater-owning defendants; in this way each will obtain assured playing time within the 3,137 theaters owned by the five major defendants. For example in the 1943-44 season the five major defendants in the operation of their theaters each paid in excess of 71% of its total annual rental payments in its own theaters to itself and the four other theater-owning defendants for features. The totals in each case paid to all five major defendants were: R.K.O. 74.3%; Fox 78.2%; Warners 76.6%; Paramount 81.8%; and Loew's 71.4%.

(See Appendix for complete chart, Table B.) In this way, each defendant will be enabled to rid itself of its inferior pictures by licensing to the defendants' own theaters; in this way, each of the five defendants is given a "cushion", a guarantee against the risks of competition, and an enormous strategic advantage over all other producers. The president of R.K.O., Mr. N. P. Rathvon, in his frank testimony amply demonstrates the accuracy of these conclusions when he testified (Record page 1622; Sten. Minutes 2224):

> *"In the first place, if you have got an unsuccessful picture, your first-run outlets that you control let it get into the flow of distribution and that is very important, because if you have an unsuccessful picture and your first-run exhibitor has no responsibility to you, you are foreclosed from that whole territory if you fail to get it into first-run theaters. So it is, for your unsuccessful pictures, it gives you a chance to get some revenue back because you forced it into the flow of distribution."* (Italics added.)

The word "forced" used by Rathvon in his testimony is no accident. It means the power obtained by R.K.O. through its ownership or control of 103 choice theaters in the United States.[6] No one denies that R.K.O., if it

[6] The testimony of Mr. Rathvon indicates the purpose for which R. K. O. controls its theatres. The creation of vertical power through control of consumer outlets was considered by this Court with respect to such expansion to meet normal business needs as distinguished from vertical control expansion for purposes of domination of the market. See United States of America v. Yellow Cab Co., et al., 91 L. Ed. 1594, page 1601, where it was said: "The theory of the complaint, to borrow language from United States v. Reading Co. 253 US 26, 57, 64 L ed 760, 778, 40 S Ct 425, is that 'dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.' If that theory is borne out in this case by the evidence, coupled with proof of an undue restraint of interstate trade, a plain violation of the Act has occurred. Cf. United States v. Crescent Amusement Co. 323 US 173, 189, 89 L ed 160, 171, 65 S Ct 254."

so desired, could properly use its own theaters for its own product exclusively, but that it would not or could not do because it does not have enough product to service its own theaters and the revenue from the theaters would then not be sufficient. When Mr. Rathvon says "forced into distribution" he means that R.K.O. uses its 103 theaters so as to force a position for R.K.O. pictures, good, bad or indifferent, into some or all of the theaters owned by the four other theater owning defendants who all use their theaters similarly. R.K.O.'s position as put by Mr. Rathvon obviously is the same as the four other major defendants as evidenced by their interrogatories heretofore referred to, which showed that in the 1943-1944 season in the operation of their theaters, each paid in excess of 71% of the total rental paid by the theaters owned by each of the defendants to itself and the other theater-owning defendants.

The bloc of theaters, numbering 3,137, owned by the five major defendants produces the cream of the motion picture income in the United States. It is situated so as to control the key cities and market. It, therefore, gives the five defendants the power to dominate the industry; it gives the defendants the power to exclude ideas from the market-place;[7] it gives the defendants the power to exclude competitors from the market-place, for any inde-

[7] In **Marsh v. Alabama**, 326 U. S. 501, 507-9 (1946), this Court held that: "* * * certainly the corporation can no more deprive people of freedom of press and religion than it can discriminate against commerce." The Court further observed that: "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. * * * In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties, and the enforcement of such restraint by the application of a state statute.

pendent producer must necessarily show his pictures in some, if not a substantial number, of the defendants' theaters to come out whole on a picture; most important it has taken away from the public its right to select which picture it thinks is best and which picture it wishes to see, and the court's decree leaves this concentration of power unimpaired.

Thus, a free competitive market cannot be restored to the industry until exhibition has been divorced from distribution; until the superior economic position accruing to defendants from their ownership of theaters, is dissipated.

Finally, even assuming for the purposes of this argument that there were no proof of monopoly in ownership of theaters, alone, this court has stated that the Sherman Act requires the removal of an innocent part of an industry if tied in with illegal restraints. In the *Associated Press* case, Mr. Justice Douglas said (p. 24):

> "For it is well settled that a feature of an illegal restraint of trade, which is innocent by itself and which may be lawfully used if independently established, may be uprooted along with other parts of an illegal arrangement" (citing the *Ethyl* and *Univis* cases).

Here, even assuming arguendo that ownership of theaters by defendants was "innocent by itself", the fact remains that the illegal restraining trade practices were made possible and effective as a result of theater ownership, and that the two are so inextricably interwoven that the one—theater ownership—should be "uprooted along with the other parts of [the] illegal arrangements"—the enjoined trade practices.

(c) The Defendants' Efficiency Argument

One of the factors impelling the court below to accept the position that divestiture was unnecessary at this time to protect the public interest was the argument that the majors run their theaters efficiently; they "have demonstrated experience and skill in operating what must be regarded as in general the largest and best equipped theaters." The court's conclusion against divestiture because of the efficiency shown by the defendants in their operations of theaters is irrelevant. Monopolists always claim to be efficient.

An examination of the voluminous record here reveals no substantial evidence to support the contention that out of a total of 18,076 theaters in the United States, the 3,137 owned by the major defendants are "larger, best equipped", more skillfully and efficiently operated or that others do not do as good or better social jobs tested on this meager level. However, even assuming this to be true, the court itself, with an eye cocked in the direction of public interest, stated that divestiture would create "a new set of theater owners which would be quite unlikely for some years to give the public as good service as the exhibitors they would have supplanted * * *". Nowhere does the record afford support for this latter assertion either, nor is there any evidence which measures service in terms of variety of pictures exhibited.

The court thus implies that independent exhibitor competition could in a few years render as good service as that provided by the majors, but it again assumes the unproven contention that independent exhibition does not do so today. The statutory court seemed to appraise the public interest in terms of the physical appointments in defendants' theaters. It is an extremely narrow view that permits an unhealthy restricting power to remain alive in the market-place of ideas, in return for the assumed physi-

cal convenience of the public for a few years. This defense of monopoly, which may be called the "plush seat defense" should have been disregarded completely. In any event the court should have balanced off the superior (if such they are) brick and mortar of defendants' theaters against the danger of continuing the power of the major defendants to restrict and limit the number and quality and kind of pictures. It is dubious whether this finding—a finding based on physical convenience or even efficiency—can be said to have any validity in the absence of a finding of a greater offer by defendants of diversity of product to movie audiences. Plush seats or rococo walls cannot make up for limitations of the product shown in theaters; wide lobbies are a poor substitute for a narrowed area of selectivity for consumers.

(d) "Competitive Bidding"

The court below sought to dispose of the plight of the independent exhibitor by the imposition of a new method of doing business in the motion picture world—the so-called "competitive bidding" system. The independent exhibitor has in the court below strenuously objected to this method of doing business.

This device is basically objectionable because it places the operations of a large business under the aegis of the court.[8] It is further objectionable because it harms the in-

[8] See **U. S. v. Pullman Co.**, 64 F. Supp. 108, 110 where the court stated:

"We take it that the judgment of a court under the Sherman Law is not to substitute the judicial judgment for that of the proprietors of the country's business enterprises. We think it is the court's task to strike at monopolistic practices when it finds them to exist and then leave it to competitive business freed from monopoly, to take advantage of the freedom to profit itself and incidentally benefit the public."

See also **Hartford Empire v. U. S.**, 323 U. S. 386; **U. S. v. Bausch & Lomb**, 321 U. S. 707, 728.

dependent exhibitor, the very one whom it seeks to protect. No independent can out-bid the concentrated economic power represented by any one of the defendants who, too, will be bidding for product for its theaters and the independent exhibitor may thus well be frozen out of the market. Furthermore, in permitting the defendants to retain their theaters, they are given a ready market for their own pictures and a source of supply which the independent exhibitor does not have.

Motion pictures are a rare commodity. Over the past few years the annual production by all producers in the United States has averaged between 300 and 400 feature films. Many theaters running double features and requiring more than one change a week need upwards of 200 of these pictures annually. Where one of the major defendants has to bid for outside pictures, it goes without saying, that with its virtually unlimited resources it can easily afford to make a more substantial bid for a questionable picture, and take a loss in case of bad judgment; the independent exhibitor can ill afford any such losses. The defendants, however, can afford to further stifle competition by buying up the more popular product in order to put competitive theaters at a disadvantage. The theater owner who does not produce pictures cannot average out a theater loss against a non-existent production profit.

The proposed bidding system and the criteria set down by the court for its operation, will create constant dispute between the major defendants and the independent exhibitors. Arbitration is suggested but, of course, cannot be compelled, and endless litigation seems to be indicated and inferentially invited.

The court below apparently admits that its own concept of the marketing of films—by the auction block principle—is less than self-operating. It admits that prices and terms

of marketing will not find their proper levels by the free play of bids and offers. It admits that arbitration—influenced by court enforcement practices—is needed to carry into effective use the novel auction plan conceived.

Finally, "competitive bidding" cannot be competitive in a true sense where a concentration of economic power, arising from theater ownership, continues to exist. Inevitably, the market will be dominated by "unequal", or strategically superior, buyers—the theater-owning defendants.

(e) Conclusion and Summary

The touchstone of effective enforcement of the antitrust laws lies in the granting of effective remedies and adequate relief. In many of the complex industrial situations which seem to characterize modern economic life—where the infringement of the antitrust laws goes to the heart of the industrial organization in the particular market—basic changes cannot be accomplished by ordinary injunctive or "cease and desist relief".[9] This is especially so where as in the instant case the continuing threat to competition lies in the size and integration of the units involved, and their relationship to each other and the market.

If the Sherman Act is to be made effective in those cases where the fault lies with the highly integrated organization of the industry, as here, then adequate relief by the courts must be directed against such integration. There is no merit in the ceremony of finding an infringement of

[9] It has come to be widely recognized that the Department of Justice, and the courts, have had great difficulty in framing and enforcing effective decrees. Where the courts have surrendered to caution and entered decrees merely containing prohibitions against specific trade practices, subsequent difficulties have revealed that such measures are rarely successful since they do not attack the source of the evil (see 56 Yale L. J. 77, 78-81).

ants and their licensees stating the minimum admission prices which licensees are required to maintain in showing the distributors' pictures in the areas concerned. The agreements are not only between the distributor-defendants and other defendants owning theatres, but also between the distributor-defendants and independent theatre owners. A correlation of these agreements shows that in many instances the minimum prices set forth in the license agreements by the various defendants are in substantial conformity. Indeed, it is conceded in the joint brief filed on behalf of Loew's, Paramount, Warner, RKO and Twentieth Century-Fox that the admission prices included in licenses of the various distributor-defendants are in general uniform, being the usual admission prices currently charged by the exhibitors. At pages 31-2 of the joint brief it is stated:

> "The testimony shows that it is the general practice of all the distributors, whether dealing with independent exhibitors or affiliated ones, to include a provision in the license agreement that the exhibitor shall not charge less than a specified minimum admission price during the exhibition of the particular picture or pictures licensed. * * * The minimum admission price included in the license is not one which the distributor dictates, but is the usual admission price currently charged by the exhibitor. (R. 433, 718, 968, 999, 1382-3). It is the practice of exhibitors to charge the same scale of admission prices over a period of time and not to change them according to whose pictures are being exhibited or according to any fluctuations in the type of picture."

A similar statement is made at page 18 of the brief of Columbia, and the brief of United Artists and Universal appears to argue on the same assumption at pages 24-39.

It does not seem important whether the distributor was the more controlling factor in determining the minimum admission prices. Whether it was such a factor or merely acceded to the customary prices of the exhibitors, in either event there was a general arrangement of fixing prices in which both distributors and exhibitors were involved. But

it is plain that the distributor did more than accede to existing price schedules.[4] The licenses required them to be maintained under severe penalties for infraction, and the evidence shows that the distributors in the case of exceptional features, where not satisfied with current prices, would refuse to grant licenses unless the prices were raised.[5] More-

[4] Reagan, vice-president in charge of distribution and sales for Paramount, testified as follows:

"Q. Well, does that (the admission price) fix his right to particular run or to clearance? A. It would have an influence upon the run and clearance, yes, sir."

. . . . . .

"Q. Why would you be interested in the minimum admission price or the admission price charged by the exhibitor in connection with determining what run you would negotiate for? A. Because the admission price that he charges determines the film rental that I can earn for my pictures." Record pp. 718-9.

See also testimony of Kupper in charge of distribution organization of RKO. Record p. 1084.

[5] Testimony of John J. Friedl, president of Minnesota Amusement Company—the stock of which is owned by Paramount, was as follows:

"Q. Are there occasional instances of special attractions where there is a negotiation as to a higher admission price with the distributor? A. That has come up on several occasions. In the case of the picture 'Woodrow Wilson', and several other pictures, they have been released by the distributors as road show attractions, and in those cases the distributors insisted upon road show prices, and it was the option of the purchaser, or the theatre, to buy or not to buy those pictures at those prices; but if he expected to play the picture at that time, he would have to charge such admission price.

"Q. And if he was not willing to advance his admission price to meet the distributor's terms, he had the opportunity to play this picture on regular run, is that right? A. At a later date, that is correct.

"Q. Is the provision for that minimum admission price included not only in license contracts for first-run exhibition but also for subsequent-run exhibition? A. Yes, I think it applies in all cases.

"Q. Is it included in license contracts for percentage pictures and also for flat rental pictures? A. Yes, sir.

"Q. Where the admission price is included for subsequent-run exhibition, does your answer with respect to who determines the admission price apply to that as well? A. That is correct. But, of course, it is reasonable to assume, to understand, that in setting our admission prices, we do not do that on an arbitrary basis because it is reasonable to expect that the larger theatres playing the first-runs

over, the distributors, when licensing on a percentage basis, were interested in the prices charged and even when licensing for a flat rental were interested in admission prices to be charged for subsequent runs which they might license on a percentage basis. Likewise all of the five major defendants had a definite interest in keeping up prices in any given territory in which they owned theatres, and this interest they were safeguarding by fixing minimum prices in their licenses when distributing their films to independent exhibitors in those areas. Even if the licenses were at a flat rate, a failure to require their licensees to maintain fixed prices would leave them free by lowering the current charge to decrease through competition the income in the licensors' own theatres in the neighborhood. The whole system presupposed a fixing of prices by all parties concerned in all competitive areas.

The similarity of specified minimum prices prescribed for the same theatres in the distributor-defendants' contracts of license is shown by the following table collated from exhibits in evidence.[6] The exhibits used to prepare the table contained answers of the defendants to plaintiff's interrogatories about the first block of five features licensed for the 1943-44 season by each of the five major distributor-defendants, and about the first five pictures licensed by each of the three minor defendants, and about that picture of each defendant which during the season received the most billings in the United States.

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would get the maximum price for the protection of the distributor and the producer. And in the secondary houses the prices are less.

"Q. That is, generally speaking, the first-run houses charge a higher price than subsequent-run, and then the prices step down among the runs? A. That is correct." Record p. 1000.

[6] This table is derived from Plaintiff's Exhibits 41, 42, 57 (1-49), 82, 94, 126, 127, 128, 139, 365, 369. In most of the exhibits there was no indication as to whether the admission price given included or excluded taxes. When this information was given in the exhibits, it is stated in the table as "tax incl.", or "tax excl." The word "none" is used to mean that though a license was in evidence, no admission price was specifically stated in the contract, either through inadvertence or on the understanding that the admission prices currently being charged or contained in previous licenses would be continued. Record pp. 433, 724, 782, 1082, 1211. The symbol "x" is used to indicate that no license of that distributor for that particular theatre was in evidence.

Theatre	City, State	Paramount	Loew's	Warner	RKO	Fox	Col.	U. A.	Univ.
Strand	Akron, Ohio	30¢ tax excl.	27¢	30¢	30¢	x	x	30¢	x
Bailey	Buffalo, N. Y.	30¢	x	29¢	none	27¢	29¢	none	x
Liberty	Covington, Ky.	28¢ tax excl.	x	33¢ tax incl.	none	x	x	x	x
Madison	Covington, Ky.	28¢ tax excl.	28¢	x	none	28¢	x	x	x
Lafayette	Niagara Falls	30¢ tax incl.	27¢	x	none	27¢	x	x	x
Paramount	Akron, Ohio	30¢ tax excl.	22¢	25¢	none	30¢	x	25¢	x
Capitol	Cleveland, Ohio	30¢	27¢	30¢	x	30¢	x	x	x
Shaker	Cleveland, Ohio	35¢ tax excl.	x	35¢	x	35¢	x	35¢	x
Heights	Cleveland, Ohio	30¢ tax excl.	27¢ tax incl.	30¢	none	30¢	x	x	x
Senate	Detroit, Mich.	x	37¢	35¢	none	35¢	x	none	x
Rits	Baltimore, Md.	x	25¢	28¢ tax incl.	none	25¢	x	none	25¢
Vilma	Baltimore, Md.	x	25¢	28¢	none	25¢	x	none	x
Centre	Baltimore, Md.	x	30¢	33¢ tax incl.	x	30¢	x	x	30¢
Hampden	Baltimore, Md.	x	x	x	x	27¢	x	27¢	25¢
Columbia	Baltimore, Md.	x	25¢	28¢	none	25¢	x	x	25¢
Broadway	Baltimore, Md.	x	27¢	x	x	27¢	x	27¢	25¢
Apollo	Baltimore, Md.	x	25¢	x	x	27¢	x	25¢	25¢
Irvington	Baltimore, Md.	x	x	28¢	25¢	25¢	x	x	25¢
Montevista	Cincinnati, Ohio	30¢	30¢	x	33¢	x	x	30¢	x
20th Century	Cincinnati, Ohio	29¢ tax excl.	30¢	x	30¢	x	x	30¢	x
Jackson	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Esquire	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Sunset	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Westwood	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Lawrence	New Haven, Conn.	27¢	27¢	33¢	27¢	27¢	x	25¢	x
Westville	New Haven, Conn.	30¢	30¢	33¢	none	30¢	x	30¢	x
Pequot	New Haven, Conn.	30¢	30¢	33¢	30¢	x	x	33¢	x
Whalley	New Haven, Conn.	30¢	30¢	33¢	none	30¢	x	30¢	x
Hamilton	Indianapolis, Ind.	35¢	x	35¢	35¢	35¢	x	x	x
Sunshine	Albuquerque, N. M.	none	40¢	x	42¢	40¢	30¢	x	x
Rio	Appleton, Wisc.	40¢	46¢	none	none	45¢ tax incl.	none	x	46¢ plus 9¢ tax
Rex	Beloit, Wisc.	36¢	27¢	40¢	35¢	36¢ tax incl.	35¢	x	42¢ plus 8¢ tax
Capitol	Charleston, W. Va.	x	40¢	x	40¢	x	x	x	x
Albee	Huntington, W. Va.	40¢	40¢	34¢	35¢	40¢	x	x	40¢
Reed	Alexandria, Va.	35¢	35¢	39¢ tax incl.	none	35¢	37¢	x	35¢
Rosna	Norfolk, Va.	27¢	27¢	x	x	x	x	x	x
Flynn	Burlington, Vt.	25¢	36¢	x	35¢	40¢	x	x	x
Gloria or Riviera	Charleston, S. C.	40¢	40¢	44¢	27¢	40¢	15¢	x	35¢
Stadium	Woonsocket, R. I.	40¢	40¢	x	none	x	x	x	x
Bijoux		x	x	x	44¢	35¢	35¢	x	30¢

It is apparent from the foregoing that there was great similarity and in many cases identity in the minimum prices fixed for the same theatre in the licenses of all the defendants. Where there was a marked difference in price, as for example in the admissions specified by RKO, Columbia and Universal, in a theatre in Charleston, South Carolina, it is likely to have been due to the showing of a picture of a different class from the others, or upon a different run.

Such uniformity of action spells a deliberately unlawful system, the existence of which is not dispelled by the testimony of interested witnesses that one distributor does not know what another distributor is doing; and there can, in our opinion, be no reasonable inference that the defendants are not all planning to fix minimum prices to which their licensees must adhere. See Record p. 1322.

In addition, several of the exhibits disclose operating agreements between the five distributor-defendants who are also theatre owners, or between them and independent theatre owners in which joint operation of the theatres covered by the agreements is provided and minimum admission prices to be charged are either stated therein, or are to be jointly determined by other means. Apparently those particular price fixing agreements do not involve the three minor defendants or their subsidiaries. For example, in Plaintiff's Exh. 220 there are agreements between subsidiaries of Loew's and Warner, covering the period of May 5, 1938 to August 31, 1947, according to which the admission prices for three theatres in Pittsburgh—two of Warner and one of Loew's—are to be fixed by a joint committee. In Plaintiff's Exh. 218, an agreement between Warner and Paramount provides that from March 1, 1936, to August 31, 1953, two theatres previously operated by Warner, and one theatre previously operated by Paramount in Hammond, Indiana, should be managed by Warner Bros. Circuit Management Corporation and the then present scale of admission prices maintained. By other agreements in Plaintiff's Exh. 219, RKO and Warner provided for joint operation from August 27, 1937, to August 31, 1950, of five theatres in Cleveland—three of RKO and two of Warner—for which minimum prices are to be determined by a joint operating committee. See also, *e.g.*, Plaintiff's

Exh. 229 (Warner and independent); Exh. 213 (Loew's and independents); Exh. 202 (RKO and independent); Exhs. 226, 326a (Paramount, Warner, and independent); Exh. 223 (Warner and independent); Exh. 386 (Paramount, RKO and independent); Exhs. 238, 239 (Fox and independents); Exh. 387 (Paramount, RKO and independent); Exh. 206 (RKO and Paramount); Exh. 221 (Warner and Paramount); Exh. 209 (RKO and Paramount); Exh. 205 (Paramount and independent). These agreements show the express intent of the major defendants to maintain prices at artificial levels.

As further evidence of a conspiracy among the distributors to fix prices, we find master agreements and franchises between various of the defendants in their capacities as distributors and various of the defendants in their capacities as exhibitors. These contracts stipulate minimum admission prices often for dozens of theatres owned by an exhibitor-defendant in a particular area of the United States. Loew's as distributor, for example, fixed minimum prices for nearly all of Paramount's 133 theatres in Florida in an agreement covering the 1943-44 season. Plaintiff's Exh. 57 (11). In the Chicago area Loew's again as distributor specified prices in a single agreement for upwards of 50 theatres owned by a Paramount subsidiary, Balaban & Katz Corporation. Plaintiff's Exhs. 250, 173. United Artists as distributor also specified prices for the Balaban & Katz theatres in Chicago for the 1941-42 season. Plaintiff's Exh. 369 (6). Similarly, Loew's specified prices for the entire Warner circuit of theatres for the 1943-44 season, Plaintiff's Exh. 57 (8-10, 21-2, 30, 32, 35, 38, 48); for the same season United Artists specified prices for five RKO theatres in Cincinnati, Plaintiff's Exh. 274; Paramount for seven RKO theatres in Cincinnati, Plaintiff's Exh. 240; Loew's for the same seven RKO theatres in Cincinnati, Plaintiff's Exh. 248; Warner for forty or more RKO theatres in Greater New York, Plaintiff's Exh. 126; Loew's for six Fox theatres in Los Angeles County, Plaintiff's Exh. 249; Warner for subsequent run Paramount theatres in Detroit and Birmingham, Michigan, Plaintiff's Exh. 244.

A master agreement between United Artists as distributor and Fox as exhibitor for the season 1938-39 covered dis-

tribution of pictures of five independent producers in Fox theatre circuits in Los Angeles, San Francisco, Salt Lake City, St. Louis, Milwaukee, Omaha, Denver, and other cities, all on a percentage basis. It contained the following clause:

> "Where pictures are licensed on a percentage rental basis the scale of admission prices to be not less than the scale of admission prices charged to view pictures of comparable quality exhibited by the exhibitor and distributed by distributors other than United Artists."

The foregoing quotation shows an acquiescence of United Artists in admission prices fixed by any other distributor and an adherence to those prices in its own licenses. Plaintiff's Exh. 199.

A franchise agreement between Universal Corporation as distributor and Interstate Theatres, Inc., and Texas Consolidated Theatres, Inc., for the seasons 1941-44 is similar. Plaintiff's Exh. 261. In each of the two latter companies Paramount had a 50% interest. The franchise covered pictures distributed by Universal to the Theatres of the two licensees and contained the ordinary provisions for penalties if minimum admission prices were not maintained. See note 2 *supra*. While no minimum prices were specified in the agreements it is not really questioned that in such circumstances the current prices were implied as part of the contract. See Record pp. 433, 724; 782, 1082, 1210-11.

There is also in evidence a franchise agreement between Columbia Pictures Corporation as distributor and Marcus Loew Booking Agency, a Loew's subsidiary, for the seasons 1944-46 covering pictures distributed to Loew's Metropolitan New York Circuit. Plaintiff's Exh. 471. Minimum admission prices were not specified, but, as in other cases, were implied.

Licenses granted by one defendant to another for exhibition in only one theatre, while less striking evidence of conspiracy than the above master agreements and franchises, disclose the same inter-relationship among the defendants. Each of the five major defendants as a theatre-owning exhibitor has been licensed by the other seven

defendants as distributors to exhibit the pictures of the latter at specified minimum prices. RKO, for example, as a theatre-owner, has been granted licenses with price restrictions by the other defendant-distributors. In turn, RKO, being itself a distributor, has granted similar licenses to the other four exhibiting defendants. We think that RKO, Loew's, Warner, Paramount and Fox, in granting and accepting licenses with minimum prices specified, have among themselves engaged in a national system to fix prices, and that Columbia, Universal and United Artists, in requiring the maintenance of minimum prices in their licenses granted to these exhibitor-defendants, have participated in that system.

It is a reasonable inference from all the foregoing that the distributor-defendants have acquiesced in the establishment of a price-fixing system and have conspired with one another to maintain prices. Such a conspiracy is *per se* a violation of the Sherman Act. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *United States* v. *Masonite Corp.*, 316 U. S. 265.

Moreover, irrespective of the conspiracy among distributors to which we have referred, each distributor-defendant has illegally combined with its licensees, for in agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices. Each licensee knows from the general uniformity of admission price practices that other licensees having theatres suitable for exhibition of a distributor's picture in the particular competitive area will also be restricted as to maintenance of minimum prices, and this acquiescence of the exhibitors in the distributor's control of price competition renders the whole a conspiracy between each distributor and its licensees. An effective system of price control in which the distributor and its licensees knowingly take part by enter-

ing into price-restricting contracts is thereby created. That the combination is made up of a sum of separate licensing contracts, individually executed, does not affect its illegality, for tacit participation in a general scheme to control prices is as violative of the Sherman Act as an explicit agreement. *Interstate Circuit* v. *United States*, 306 U. S. 208; *United States* v. *Masonite Corp.*, 316 U. S. 265; *Goldman Theatres, Inc.* v. *Loew's Inc.*, 150 F. 2d 738 (C. C. A. 3).

This practice of stipulating minimum admission prices in the contracts of licenses is illegal in another respect. The differentials in price set by a distributor in licensing a particular picture in theatres exhibiting on different runs in the same competitive area are calculated to encourage as many patrons as possible to see the picture in the prior-run theatres where they will pay higher prices than in the subsequent runs. The reason for this is that if 10,000 people of a city's population are ultimately to see the picture—no matter on what run—the gross revenue to be realized from their patronage is increased relatively to the increase in numbers seeing it in the higher-priced prior-run theatres. In effect, the distributor, by the fixing of minimum prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible. This, we believe, to be in violation of § 2 of the Sherman Act, at least when the distributor's own theatres are not exhibiting its picture on a prior-run and it is to theatres other than its own that it attempts to give a monopoly.

It is argued that the practice of minimum admission price-fixing is permitted under the Copyright Act. But that act has never been held to sanction a conspiracy among licensors and licensees artificially to maintain prices. We do not question that the Copyright Act permits the owner of a copyrighted picture to exhibit it in its own theatres upon such terms as it sees fit, nor need we now decide whether a copyright owner may lawfully fix admission prices to be charged by a single independent exhibitor for the exhibition of its film, if other licensors and exhibitors are not in contemplation. *Interstate Circuit* v. *United States*, 306 U. S. 208; cf. *United States* v. *General Electric Co.*, 272 U. S. 476. As other licensors and exhibitors are

always in contemplation, so far as we can see, the question would appear academic.

This does not contravene the rule announced in *United States* v. *General Electric Co.*, 272 U. S. 476, for there a license to only a single licensee—the Westinghouse Company—was involved, and, therefore, no conspiracy which sought to amplify the rights of the licensor under the Patent Act. The other question involved in that case was whether a patentee might lawfully require its bona fide agents to maintain minimum prices in selling the former's patented articles. The court held that it could. There is no claim here, however, that the exhibitors as licensees under the distributors' copyrights are agents in any sense, and we do not see that such a claim could be made. In any event, *United States* v. *Masonite Corp.*, 316 U. S. 265, involved facts closely analogous to those here and affords ample basis for our decision.

Some argument has been made that the defendants' fixing of minimum admission prices is exempted from operation of the Sherman Act by the Miller-Tydings Amendment to that act, 50 Stat. 693 (1937), 15 U. S. C. A. § 1 (1940). The amendment pertains, however, only to "contracts or agreements prescribing minimum prices for the resale of a commodity", and the undisputed evidence is that the distributors merely grant licenses to the exhibitors for exhibition of their films and that title to none of their films at any time passes to the exhibitors. Furthermore, the distributor-defendants have engaged in a conspiracy, and the amendment explicitly states that despite its other provisions, contracts or agreements between "persons, firms, or corporations in competition with each other" to establish or maintain minimum prices remain illegal. *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707; *United States* v. *Univis Lens Co.*, 316 U. S. 241.

The foregoing holding that the defendants have all engaged in unlawful price-fixing does not prevent the distributors from continuing their present methods of determining film rentals; they may measure their compensation by stated sums, by a given percentage of a particular theatre's

receipts, by a combination of these two, or by any other appropriate means. What is held to be violative of the Sherman Act is not the distributors' devices for measuring rentals, but their fixing of minimum admission prices which automatically regulates the ability of one licensee to compete against another for the patron's dollar and tends to increase such prices as well as profits from exhibition.

If the exhibitors are not restrained by the distributors in the right to fix their own prices, there will be an opportunity for the exhibitors, whether they be affiliates or independents, to compete with one another. This is because one exhibitor by lowering admission prices will be able to compete with other exhibitors in obtaining patrons for his theatre—a competition which may well benefit both exhibitors and the public paying the admission fees.

Clearance and Run

Among provisions common to the licensing contracts of all the distributor-defendants are those by which the licensor agrees not to exhibit or grant a license to exhibit a certain motion picture before a specified number of days after the last date of the exhibition therein licensed. This so-called period of "clearance" or "protection" is stated in the various licenses in differing ways: in terms of a given period between designated runs, as for example in the Chicago area, Plaintiff's Exh. 369, see *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C. C. A. 7), affirmed 326 U. S. (February 25, 1946), and as in Washington and New York, Plaintiff's Exhibits 244, 471; in terms of admission prices charged by competing theatres, as "20 days over 30¢ theatres, 28 days over 25¢ theatres," Plaintiff's Exhibits 57, 173, 178, 189; in terms of a given period of clearance over specifically named theatres, Plaintiff's Exhibits 94, 181, 242, 253, 259; in terms of so many days' clearance over specified areas or towns, Plaintiff's Exhibits 126, 175, 182, 182A, 183, 194, 244, 250, 255, 470, 476; in terms of clearances as fixed by other distributors, Plaintiff's Exhibits 188, 417; or in terms of combinations of these formulae.

It appears to be plaintiff's contention that clearance practices inherently operate to produce unreasonable re-

strictions of competition among theatres and are therefore *per se* violative of the Sherman Act. With this we do not agree, for it seems to us that a grant of clearance, when not accompanied by a fixing of minimum prices or not unduly extended as to area or duration, affords a fair protection to the interests of the licensee without unreasonably interfering with the interests of the public. At common law a vendor of income-producing property may validly covenant with his purchaser not to compete for a given time or within a given area so long as the restrictions are reasonably necessary to protect the value of the property purchased. *Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co.* v. *Bay*, 200 U. S. 179; see *Rogers* v. *Parry*, 2 Cro. 326 (K. B. 1613); *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6). It is true that licenses of property rather than sales are here concerned and that the distributors covenant not only not to exhibit the films themselves, but also not to license them to others. Nevertheless, we believe these are not differences which affect the applicability of the common-law rule to the present case, for licenses between one distributor and one exhibitor with reasonable clearance provisions do not, in our opinion, involve anything unlawful. Such provisions are no more than safeguards against concurrent or subsequent licenses in the same area until the exhibitor whose theatre is involved has had a chance to exhibit the pictures licensed without invasion by a subsequent exhibitor at a lower price. It seems nothing more than an adoption of the common law rule to restrict subsequent exhibitions for a reasonable time within a reasonable area. While clearance may indirectly affect admission prices, it does not fix them and is, we believe, a reasonable restraint permitted by the Sherman Act. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Westway Theatre, Inc.* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830, affirmed on opinion below, 113 F. 2d 932 (C. C. A. 4); see *United States* v. *Masonite Corp.*, 316 U. S. 265; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436.

The costs of each black and white print is from $150 to $300, and of a technicolor print is from $600 to $800. Many

of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high-priced theatres unless a system of successive runs with a reasonable protection for the earlier runs is adopted in the way of clearance.

In Section VIII of the Consent Decree, moreover, there is the explicit statement to which all parties, including the plaintiff, consented.

> "It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures."

While, as previously stated, we do not deem ourselves bound by any provision of the consent decree, if we now find that it violates the Sherman Act, the forcefulness of the phrasing of this sentence indicates the proved utility of clearance practices in the movie industry and also their apparent necessity for a reasonable conduct of the business. Indeed, it is practically conceded that exhibitors would find extremely perilous the acceptance of licenses for the exhibition of films without assurance by the distributor that a nearby competitor would not be licensed to show the same film either at the same time or so soon thereafter that the exhibitor's expected income—perhaps on the basis of which he agreed to the specified rental—would be greatly diminished. Moreover, we understand the plaintiff to concede that the licensor may license its pictures for different successive dates. A reasonable clearance is in practical effect much the same. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later-exhibiting theatre at lower than prior rates.

Several courts have previously considered the validity of clearances under the Sherman Act and have concluded that in the absence of an unconscionably long time or too extensive an area embraced by the clearance, or a conspiracy of distributors to fix clearances, there was nothing of itself illegal in their use. *Westway Theatre, Inc.* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830 (D. Md.), affirmed on opinion below, 113 F. 2d 932 (C. C. A. 4), and unreported

cases therein cited; *Gary Theatre Co.* v. *Columbia Pictures Corp.*, 120 F. 2d 891 (C. C. A. 7). We find the reasoning of these cases persuasive.

It is true that in some instances large theatre circuits by use of their great film-buying power have been able to negotiate successfully with the distributor-defendants for grants of unreasonable clearances or unjustified prior runs for their theatres. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C. C. A. 7), affirmed 326 U. S. — (February 25, 1946); *Goldman* v. *Loew's*, 150 F. 2d 738 (C. C. A. 3); *United States* v. *Schine Chain Theatres, Inc.*, 63 F. Supp. 229 (W. D. N. Y.). While we cannot find sufficient evidence to support an inference that the major defendants here, though controlling some of the largest circuits of theatres in the country and thus possessing potential weapons of great strength, have either collectively or severally entered upon a general policy of discriminating against independents in their grants of clearances, yet they have acquiesced in and forwarded a uniform system of clearances and in numerous instances have maintained unreasonable clearances to the prejudice of independents and perhaps even of affiliates. The decision of such controversies as may arise over clearances should be left to local suits in the area concerned, or, even more appropriately, to litigation before an Arbitration Board composed of men versed in the complexities of this industry.

In determining the reasonableness of the specific clearances which may come before these tribunals, they should consider whether the clearance has been set so as to favor affiliates or control the admission prices of the theatres involved. A distributor will naturally tend to grant a subsequent run to and clearance over a theatre for which the owner of his own volition sets a low admission price; for the distributor will be inclined to seek out the higher priced theatres first where the revenue is likely to be greater and consequently in case of licenses on a percentage basis where a percentage share will be higher. This, however, would seem the inevitable result of the competition for the distributor's films from theatres which are the larger or better equipped, and for which higher admission prices may there-

fore be charged by their operators. Such competition the lower priced theatres must be prepared to meet, or else be content with subsequent runs and grants of clearance over them. The temptations to the distributor to use clearance grants to force a theatre to raise its prices and thus to qualify for prior runs having less clearance over it, and more clearance over competitors are nevertheless obvious and the courts or arbitration board should guard that this is not done. Clearance should be granted on the basis of theatre conditions which the exhibitor creates, not the distributor. The line to be drawn is indeed indistinct, but its existence is no less real.

In determining whether any clearance complained of is unreasonable, the following factors should be taken into consideration and accorded the importance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The admission prices, as set by the exhibitors, of the theatres involved;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, giveaways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

The foregoing has been directed to the validity of clearance provisions resulting from separate negotiations be-

tween individual distributors and exhibitors in free and open competition with other distributors and exhibitors, and, as stated, we believe their reasonable use to be lawful. It is here claimed by plaintiff, however, that the distributor-defendants have acted in concert in the formation of a uniform system of clearances for the theatres to which they license their films and that the exhibitor-defendants have assisted in creating and have acquiesced in this system. This we find to be the case and hold to be in violation of the Sherman Act.

The following testimony warrants the inference that the defendants, as we found to be the case in the fixing of admission prices, have acted in concert in their grants of run and clearance. William F. Rodgers, general sales manager and vice-president of Loew's, testified that the field managers determine whether a theatre shall be licensed to exhibit on a first or on a subsequent run, that the clearance of a given theatre is more or less historical except for that of new theatres, and that there has been very little change in clearance over a period of years. Record pp. 542-3. Prior to 1943-44 Loew's license agreements provided that the clearance granted therein should apply to any theatre thereafter opened. Record p. 556.

Charles M. Reagan, vice-president of Paramount in charge of sales, stated that once clearance is agreed upon, it remains the same unless either exhibitor or distributor wants to change it. Record pp. 710-11. There is a difference between a distributor's and an exhibitor's interest in the period of clearance granted. The distributor wants to get the most possible in film rental from all the runs, the exhibitor to get as much clearance over a succeeding run as possible, because he has no interest in any succeeding run. The distributor, however, has a definite interest. Record p. 710. Clearances as granted apply to all pictures regardless of their quality. Record p. 715.

Martin J. Mullen, vice-president of M & P Theatres, a managing corporation which operates a group of New England theatres affiliated with Paramount, said that clearance is generally negotiated each time a license contract is made, but is actually carried along from year to year and

generally understood when once established; that originally, before his time, clearance was established as a result of individual negotiations and followed along the same lines as they were with some changes. Record, p. 968. All defendants grant the same clearance to the same theatre. Record p. 977.

John J. Friedl, president and general manager of the Minnesota Amusement Company, a wholly-owned subsidiary of Paramount, said that he generally got from the various distributors the same clearance for the particular theatre for which he is negotiating; that while clearance is negotiated with each license, it generally remains the same, and the same clearance is granted by distributor-defendants and non-defendants alike, Record p. 1003; that clearance is pretty well established, and it is definitely followed in all cases. Record p. 1013.

Morton J. Thalheimer, an independent theatre exhibitor in Richmond, Virginia, called as a witness by Fox, testified that clearance was in effect in Richmond when he first went into business, and it seemed perfectly normal and natural that it should remain that way; that it protects his first-run against his own sub-runs and against his competitors' sub-runs. Record p. 1384. To his knowledge, the system of clearances had existed in Richmond for over nineteen years, during which time there had not been any change. Record p. 1401.

Harold J. Fitzgerald, president of Fox Wisconsin Theatres, Inc., operating sixty-six motion picture theatres in Wisconsin and Michigan, a wholly owned subsidiary of the defendant National Theatres Corporation, testified by affidavit that the situation with respect to the licensing of films, and the runs and clearances involved, were much the same in 1928 as they are today, Record p. 1973; that licensing arrangements were vital to distributor and exhibitor and that clearance obviously had a definite effect upon the capacity of his corporation to secure patronage at its top admission price. If Fox Wisconsin undertook to pay a distributor the film rental based upon a high percentage of gross, it would be interested in clearance over any neighborhood theatre which the distributor might license on a competing subse-

quent run. Generally negotiations as to clearance do not take place with respect to each block of pictures licensed because once a fair and reasonable clearance has been determined by the distributor and exhibitor it tends to become fixed, and ordinarily will be the same in a series of contracts in the absence of any unchanged circumstances and conditions. Record p. 1983.

Benjamin Kalmenson, sales manager of Warner Bros. Distributors Corporation, testified that clearances have been pretty well set through the country for a great many years, and are "acquiesced in by exhibitors, producers, independents, affiliates and everybody, until there has grown up a kind of system of clearance." Record p. 1506.

Robert Mochrie, general sales manager of RKO Radio Pictures, Inc., stated upon his examination that RKO in determining the length of clearance between theatres, takes into consideration the amount of clearance which in its opinion will yield it the largest revenue, taking all theatres into account as a whole and subject to a clearance condition that has built itself up in the city over a period of time. In negotiating licenses, there is frequent occasion to give consideration to the existing clearance between theatres, but they do not consider it anew each time because the factors which determined it originally at some past time remain stable from year to year. He said there are no general or frequent instances in his practice of clearances different in some particular city from those granted by a co-defendant. He usually knows what clearances other distributors are granting. His customer usually tells him what clearance he wants, which is what he is getting from other distributors. He has no agreements with other distributors that he will adopt the same clearance, and his explanation as to why in some instances the clearances granted by RKO to a prior run theatre is the same as a clearance granted by one or more other distributors serving the same theatre is that clearance has been the outgrowth in time between those two theatres, and the exhibitor buys such products on such a clearance basis and offers the witness the same. Record pp. 1714-5.

Abraham Montague, general sales manager of Columbia, testified that in negotiating deals, the "clearance is something we usually find when we arrive there, and we usually negotiate our deal within the clearance we find"; that it would be impracticable and impossible to set up new clearance. Record p. 1268. His company keeps a record of clearances in the community. Record p. 1347. Where his company grants clearance to one theatre over another, it usually follows the pattern set by clearance that is given by other major distributors as well as those which are not majors. He usually does not make any independent determination of whether the clearance is reasonable or unreasonable. He takes it as he find it, and finding it in most cases standardized, his company does not feel that it is strong enough to change it. Record pp. 1376-7.

Paul N. Lazarus, manager of the contract department of United Artists testified that clearances are "generally understood, and they follow along their established custom." Record p. 1440. For testimony of other witnesses to the same effect as the foregoing, see Record pp. 2012, 2043, 2049, 2086, 2110-11.

The fixed character of clearances and the uniformity of the distributor-defendants' practice with reference thereto are shown by the exhibits, as well as the testimony. Many of the franchises, master agreements, and so-called "formula deals" which are in evidence provide that clearances shall be the same as those in effect on the date of the agreement. See Paintiff's Exhibits 419A (RKO and independent); 419B (RKO and Paramount); 241 (Paramount and Fox); 172 (Paramount and Loew's); 473 (RKO and Universal); 245 (Warner and Fox); 251 (Fox and Paramount); 254 (Fox and RKO). Some of the agreements establish clearances for more than a season. See Plaintiff's Exhibits 181 (3 years, Loew's and Warner); 187 (3 years, Loew's and Fox); 249 (9 years, Loew's and Fox); 259 (3 years, Warner and Universal). Others provide that the clearance is to be no less favorable to the exhibitor than that which had been granted by the distributor for the previous season or in the preceding agreement. See Plaintiff's Exhibits 265, 472, (Columbia and Fox); 190 (RKO and Fox); 199, 272A, 383, (United Artists and Fox).

In some of the agreements, the clearance therein stated was also to be granted to all theatres which the exhibitor-party to the contract might thereafter own, lease, control, manage, or operate. See Plaintiff's Exhibits 172 (Paramount and Loew's); 266, 266A (Columbia and Warner); 471 (Columbia and Loew's); 192 (Fox and Warner). Moreover, the license forms for 1936-7 of Paramount, Fox, Loew's, Warner, RKO, Columbia and Universal, and for 1943-44 of Paramount, Warner, Columbia and Universal, each contain a provision identical or similar to the following:

> "If clearance is granted against a named theatre or theatres indicating that it is the intention of the Distributor to grant such clearance against all theatres in the immediate vicinity of the Exhibitor's theatre, then, unless otherwise provided in the schedule, such clearance shall include any theatre in such vicinity thereafter erected or opened." See Plaintiff's Exhibits 275, 277, 279-81, 283-6, 289-90.

It is clear that the purpose of these two types of clearance agreements was to fix the run and clearance status of any theatre thereafter opened; not on the basis of its appointments, size, location, and other competitive factors normally entering into such a determination, but rather upon the sole basis of whether it were operated by the exhibitor-party to the agreement

Much that has been said about clearances is applicable also to runs; the two are practically alike. Clearances are given to protect a particular run against a subsequent run, and the practice of clearance is so closely allied with that of run as to make comment on the one applicable to the other.

Rodgers, of Loew's, testified that a run usually remains static for a given theatre, Record p. 421, and he determines what runs shall be "offered" to an exhibitor. Record p. 418. The size of the theatre does not necessarily determine whether it is satisfactory for operation on a first run. Record p. 566.

Reagan, of Paramount, said that negotiations with an exhibitor are "usually conducted on the basis of a particu-

lar run." In the case of a new theatre, the distributor usually considers whether it wants to do business on the run the theatre would like.[7] In the New York area, second runs are sold by him only to Loew's and RKO.. Record pp. 815-16.

The evidence we have referred to shows that both independent distributors and exhibitors when attempting to bargain with the defendants have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatres or with theatres to which the latter have licensed their pictures. Under the circumstances disclosed in the record there has been no fair chance for either the present or any future licensees to change a situation sanctioned by such effective control and general acquiescence as have obtained. See *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C.C.A. 7), affirmed 326 U. S. (February 25, 1946); *Goldman* v. *Loew's, Inc.*, 150 F. 2d 738 (C.C.A. 3); *Youngclaus* v. *Omaha Film Board of Trade*, 60 F. 2d 538 (D.C. Neb.). The only way competition may be introduced into the present system of fixed prices, clearances, and runs is to require a defendant when

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[7] "Q. And some negotiations are conducted on the basis of a first-run of a product, some second, some subsequent? A. Yes, sir.

Judge Bright: You mean the particular run is established before the negotiation with the exhibitor?

The Witness: Sometimes it generally is established, although that has been the result of years of experience that we have had in negotiating with our customers.

Judge Bright: How about a new theatre or new exhibitor?

The Witness: There is nothing established there, and we consider all the factors there and make a decision on whether we want to do business with him on the run that we would like to have.

Q. Now, how is the matter of terms upon which Paramount films will be licensed, determined? A. Determined by negotiations based upon experience we have had with the particular theatre with whom we are negotiating." Record, p. 693.

Q. You do not mean that each time there is a negotiation the whole question of run is opened up again? A. No, it is not.

Q. The policy on which the theatre is operated has usually been established over a long period of time? A. Yes.

licensing its pictures to other exhibitors to make each picture available at a minimum fixed or percentage rental and (if clearance is desired) to grant a reasonable clearance and run. When so offered, the licensor shall grant the license for the desired run to the highest bidder if such bidder is responsible and has a theatre of a size, location, and equipment to present the picture to advantage. In other words, if two theatres are bidding and are fairly comparable the one offering the best terms shall receive the license. Thus price fixing among the licensors or between a licensor and its licensees as well as the non-competitive clearance system may be terminated, and the requirements of the Sherman Act, which the present system violates, will be adequately met. The administrative details involved in such changes will require further consideration. We are satisfied that existing arrangements are in derogation of the rights of independent distributors, exhibitors, and the public, and that the proposed changes will tend to benefit them all.

Formula Deals, Master Agreements, and Franchises

Formula deals, certain master agreements, and franchises have tended to restrain trade in the distribution and exhibition of motion picture features and in view of the history and relation to the moving picture business of the various parties to this action have exercised unreasonable restraints. In our opinion these restraints will be obviated or at least sufficiently mitigated by requiring a distributor wishing its pictures to be shown outside of its own theatres to offer to license each picture to all theatres desiring to show it on a particular run and, if the theatres are responsibly owned and otherwise adequate, to grant the desired run to the highest bidder.

Formula deals have been entered into by Paramount and by RKO with independent and affiliated circuits. By such agreements a particular circuit has been licensed to exhibit a certain feature in all its theatres at a specified percentage of the national gross receipts realized from that feature by all theatres in the United States. The circuit may allocate playing time and film rentals among the various theatres as it sees fit. See Plaintiff's Exhibits 241, 419A, 419B. Arrange-

ments whereby all the theatres of a circuit are included in a single agreement, and no opportunity is afforded for other theatre owners to bid for the picture in their several areas, seriously and as we hold unreasonably restrain competition. These formula deals have been negotiated without, so far as we are informed, any competition on the part of independent theatre owners who would labor under a great disadvantage in attempting severally to match or outbid the offers of a circuit that was making offers for all of its theatres.

Certain master agreements are open to the same objection as formula deals, for they cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and also to exhibit the features upon such playing time as it deems best, and leaves other terms to the circuit's discretion. See, *e.g.*, Plaintiff's Exhibits 196, 251, 267, 270, 270A, 273, 476. These are different from some other master agreements in which there are separate provisions covering the licensing of the picture for each particular theatre. See, *e.g.*, Plaintiff's Exhibits 182, 182A, 189, 190, 191, 248. These later agreements in effect only combine in one document a number of theatres with proper licenses for each. This may be done if there is an opportunity for exhibitors to bid for the same runs at an offered price.

Franchises which so far as the five major defendants are concerned were forbidden by the consent decree are also objectionable because they cover too long periods (more than one season) and also because they embrace all the pictures released by a given distributor. They necessarily contravene the plan of licensing each picture, theatre by theatre, to the highest bidder.

It is true that a prohibition of formula deals, master agreements and franchises will interfere with certain contracts which have been made in the past but their formation was a restraint upon trade which was unlawful at the time they were made, and therefore should not be continued. We see no reason to hold that the failure to bring in to this suit one of the contracting parties prevents the issue of an injunction forbidding one who is a party to the suit from continuing to carry out an arrangement which causes unlaw-

ful restraints. While our decision will not be res judicata as to those not parties to the litigation, the parties are necessarily and properly bound, and indeed the decision is a judicial precedent against the others on the questions of law involved in those situations we have referred to where they have unreasonably restrained trade and commerce.

In our opinion it follows from the foregoing that provisions in license agreements known as moveovers which give to a licensee the privilege of exhibiting a given picture in a second theatre as a continuation of a run in a first theatre are incompatible with the system we have prescribed of bidding for pictures and runs theatre by theatre. The same would seem to be true of so-called overage-and-underage provisions which are often inserted in licenses to permit an exhibitor owning a number of theatres to apply a deficit in the playing time in one or more others. Under such provisions it is not possible to determine the amount payable for the account of one theatre until the performances in the others have been completed, or practically to apply the bidding system we are establishing. But provisions in licenses for "extended" or "repeat" runs in the same theatre, though apparently criticized by the government, would not seem to be objectionable if reasonably limited in time when other exhibitors are given the opportunity to bid for similar licenses. Likewise, any other license provisions which may be called to our attention that would substantially interfere with the effectiveness of the bidding system would have to be revised and perhaps may have to be specially dealt with in the decree to follow this opinion.

Block-booking and Blind-selling.

For many years the distributor-defendants licensed their films in "blocks," or indivisible groups, before they had been actually produced. In such cases the only knowledge prospective exhibitors had of the films which they had contracted for was from a description of each picture by title, plot and players. In many cases licenses for all the films had to be accepted in order to obtain any, though sometimes the exhibitor was given a right of subsequent cancellation for a certain number of pictures. Because of complaints

of block-booking and blind-selling based upon the supposed unfairness of contracts which often included pictures—the inferior quality of which could not be known—Sections III and IV of the consent decree required the five consenting distributors to trade-show their films before offering them for license and limited the number which might be included in any contract to five. More than one block of five however could be licensed where the contents of any had been trade-shown. While this restriction in the consent decree has now ceased by time limitation, the consenting distributors have continued to observe the restriction. The non-assenting distributors have retained up to the present time their previous methods of licensing in blocks, but have allowed their customers considerable freedom to cancel the license as to a percentage of the pictures contracted for.

The plaintiff argues that the Sherman Act forbids block-booking in toto. This is said to be because it is illegal to condition the licensing of one film upon the acceptance of another, and it therefore can make no difference whether the group of films involved in a license be two or forty. In our opinion this contention is sound, and any form of block-booking is illegal by which an exhibitor, in order to obtain a license for one or more films, must accept a license for one or more other films.

A patentee who has granted a license in consideration that the patented invention shall be used by the licensee only with unpatented material furnished by the licensor may not restrain as a contributory infringer one who sells to the licensee like materials for like use. *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680; *Morton Salt Co.* v. *G. S. Suppiger*, 314 U. S. 488, 491; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502; *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458. Moreover, as was said in *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661, 670, a decree for an injunction against a contributory infringer would sanction both "a misuse of the patent privilege and a violation of the anti-trust laws." The same rule would appear to apply to copyrights and prevent a suit for contributory infringement by a copyright owner who had

licensed the printing of his book, only in connection with paper supplied by him, against a third party supplying paper to the licensee in violation of the agreement. See *Interstate Circuit Inc. v. United States*, 306 U. S. 208; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Straus* v. *Am. Publisher's Ass'n*, 231 U. S. 222.

It is true that a copyrighted motion picture when united with another copyrighted picture by block-booking is not tied to an uncopyrighted article. Nevertheless the objections to conditioning the licensing of one picture upon the licensing of another are the same, for the result is to give the copyright owner not only the reward which is his due from the licensing of a single copyrighted film, but to extend his monopoly by requiring his licensee to accept one or more other films and to pay royalties therefor as an additional consideration. We cannot see that this differs in principle from requiring the licensee to purchase uncopyrighted articles in connection with the license of a copyright. In either case the copyright owner is obtaining something which the decisions have forbidden as beyond the grant of his limited monopoly. Justice Holmes in his dissenting opinion in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 519, argued persuasively that the right of the owner of a patent to keep his device out of use included the right to condition its use. Such a doctrine would contravene the rule we are laying down, but his views were rejected by the majority of the Supreme Court in that decision, as well as in *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, and have proved to be contrary to a long line of subsequent decisions of that court—indeed to have been supplanted by the general trend of authority ever since the days of *Henry* v. *Dick*, 224 U. S. 1.

It may be argued that the common law gives a right to condition the licensing of one film upon the acceptance of another—that it is as though the owner of ordinary chattels refused to sell a lot to A unless the latter would purchase in a larger quantity than he desired. The question whether such a contract involving patents or copyrights was good at common law was apparently left open in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 503, and *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, and in

Federal Trade Commission v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152, the Court of Appeals for the Second Circuit sustained contracts of block-booking.

Block-booking, when the license of any film is conditioned upon taking of other films, is a system which prevents competitors from bidding for single pictures on their individual merits and adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first. It differs from such a sale of chattels as we have mentioned because it extends a monopoly which the owner of the chattels is not assumed to have. We are not inclined to follow *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152 (C.C.A. 2), for the reason we have given and particularly because of recent decisions of the Supreme Court. As Stone, C. J., said in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 459,—when dealing with the use of one patent to exploit another:

> "• • • It [Ethyl Gasoline Corporation] has chosen to exploit its patents by manufacturing the fluid covered by them and by selling that fluid to refiners for use in the manufacture of motor fuel. Such benefits as result from control over the marketing of the treated fuel by the jobbers accrue primarily to the refiners and indirectly to appellant, only in the enjoyment of its monopoly of the fluid secured under another patent. The licensing conditions are thus not used as a means of stimulating the commercial development and financial returns of the patented invention which is licensed, but for the commercial development of the business of the refiners and the exploitation of a second patent monopoly not embraced in the first. The patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly of another, see Standard Sanitary Mfg. Co. v. United States, supra, than for the exploitation of an unpatented article, United Shoe Machinery Co v. United States, supra; Carbice Corporation v. American Patents Corp., supra; Leitch-Manufacturing Co. v. Barber Co., supra; American Lecithin Co. v. Warfield

Co., 105 F. 2d 207, or for the exploitation or promotion of a business not embraced within the patent. Interstate Circuit v. United States, supra, 228-230."

See also *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 415, 452-3; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 670; *Mercoid Corp.* v. *Minneapolis Honeywell Regulator Co.*, 320 U. S. 680, 684; *United States* v. *Masonite Corp.*, 316 U. S. 265, 277-8; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 227-230; *Stokes & Smith Co.* v. *Transparent-Wrap Machine Corp.*, decided by Second Circuit Court of Appeals May 1, 1946.

We, however declare illegal only that aspect of block-booking which makes the licensing of one copyright conditional upon an agreement to accept a license of one or more other copyrights. A distributor may license to an exhibitor at one time as many films as the latter wishes to receive, but the distributor may not constitute groups of pictures which it refuses to license separately. The distributor may of course not license his pictures at all, but if he does license them, he must do so severally and, in accordance with the bidding procedure previously indicated, must license them to the exhibitor or exhibitors who are qualified and offer the best terms for the various runs.

Blind-selling does not appear to be as inherently restrictive of competition as block-booking, although it is capable of some abuse. By this practise a distributor could promise a picture of good quality or of a certain type which when produced might prove to be of poor quality or of another type—a competing distributor meanwhile being unable to market its product and in the end losing its outlets for future pictures. The evidence indicates that trade-shows, which are designed to prevent such blind-selling, are poorly attended by exhibitors. Record pp. 1178-9. Accordingly, exhibitors who chose to obtain their films for exhibition in quantities, need to be protected against burdensome agreements by being given an option to reject a certain percentage of their blind-licensed pictures within a reasonable time after they shall have become available for inspection. Such

right of rejection has been incorporated in numerous licenses given by the defendants and should be afforded whenever licenses of unproduced films and films not trade-shown are secured by an exhibitor who has made the best competitive bid for them.

The only group licensing we are prepared to sanction is licensing by which the group is not offered on condition that the licensee shall take all the pictures included in it, or none, but in which the pictures are separately priced, and each picture is to be sold to the highest duly qualified bidder. As we have already indicated in discussing formula deals, master agreements, and franchises, the offering of pictures should be theatre by theatre, and if more than one picture is included in a license agreement, it will be only because of business convenience and to the extent that each picture so included has received the best bid.

"Pooling" Agreements

It is claimed by plaintiff that the theatre-owning defendants have combined with each other and with independent theatre-owners by "pooling" their theatres through operating agreements, leases, joint stock ownership of theatre-operating corporations, or through joint ownership of theatres in fee. We are asked to determine the validity of these various means of joining interests.

By far the most numerous type of agreement in evidence is that by which given theatres of two or more exhibitors, normally in competition with each other, are operated as a unit or most of their business policies collectively determined by a joint committee, or by one of the exhibitors, and by which profits of the "pooled" theatres are divided among the owners according to pre-agreed percentages. See, *e. g.*, Plaintiff's Exhibits 9, 100, 200, 206, 213, 218, 220-1, 223, 226, 226A, 232. Some of the agreements provide that the parties thereto may not acquire other theatres in the competitive vicinity without first offering them for inclusion in the "pool." See, *e. g.*, Plaintiff's Exhibits 201, 205-6, 219.

These operating agreements we hold to be in clear conflict with the Sherman Act, for through them a defendant-

exhibitor reduces to a minimum opposition between its own and other theatres in the "pool." Cooperation, rather than competition, characterizes their operation, and in view of the exhibitor-defendants' financial strength, control of first-class film distribution, ownership of concentrated numbers of first-run theatres, and especially their combination to reduce competition in exhibition through systems of price-fixing and clearances, such restraints as these agreements impose upon free commerce in motion pictures are far less than reasonable. The result is to eliminate competition *pro tanto* both in exhibition and in distribution of films which would flow almost automatically to the theatres in the earnings of which they have a joint interest.

Other forms of operating agreements are between major defendants and independent exhibitors rather than between major defendants, see, *e. g.*, Plaintiffs' Exhibits 97, 118, 208, 238-9, 358, but we are not of the opinion that this renders them legal. The effect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition against theatres not members of the "pool." Even if the parties to such combinations were not major film producers and distributors, but were all wholly independent exhibitors, such agreements might often be regarded as beyond the reasonable limits of restraint allowance under the Sherman Act. This result is certain when some of the parties are of major statute in the movie industry and have in other ways imposed unlawful restraints upon it, as we have found to be the case upon the record before us.

In certain other cases the operating agreements are accomplished by leases of theatres, the rentals being determined by a stipulated percentage of profits earned by the "pooled" theatres, see, *e. g.*, Plaintiff's Exhibits 9, 106, 118, 204. This appears to be but another means of carrying out the illegal objection discussed above. While a theatre-owner may of course remove itself from the business of operating theatres by leasing them to anyone it deems fit upon a fixed rental basis, so long as a monopoly in exhibition is not thereby achieved by the lessee, any arrangement whereby one of the exhibitor-defendants in this case allies

its theatres with those of a competing exhibitor, independent or affiliated, and yet itself remains in the trade of exhibiting motion pictures by retaining an interest in the profits earned by the allied theatres, is unlawful under the anti-trust acts.

Many theatres, or the corporations owning them, are held jointly by one or more of the exhibitor-defendants, in some cases in conjunction with independents. See, *e. g.*, Plaintiff's Exhibits 8, 9, 46, 48, 62, 164, 355, 387; RKO's Exhibit 11. As these joint interests enable the major defendants to operate theatres collectively, rather than competitively, we find them illegal for the reasons above stated. Appropriate steps should be taken so that no exhibitor-defendant will own theatres (whether represented by fee, beneficial, or stock interests) jointly with other exhibitor-defendants, regardless of the size of the interests involved. Appropriate steps should also be taken so that no exhibitor-defendant or defendants will jointly own a theatre or stock interest therein with any independent exhibitor, except when a defendant or an independent owns an interest of five per cent or less, which we deem *de minimis* and only to be treated as an inconsequential investment in exhibition. See *infra* p. 71. This result may be reached in situations like Florida, Texas, Minnesota and Michigan by a sale, purchase, or exchange of interests in jointly-owned theatres so long as the transaction sought to be achieved will not result in an unreasonable restraint of competition in exhibition within the particular competitive area. To this end the court will control the manner in which rearrangements of these joint interests are effected.

It seems impracticable to do more than lay down general rules as to the foregoing situations. If further details are required to cover specific provisions of the various pooling agreements, they should be set forth in the decree to be hereafter entered.

It should be added that in our opinion there can be no objection to operating, booking, or film buying through agents, provided the agent is not also acting in respect to theatres owned by other exhibitors, independent or affiliated, and provided that in case the agent is buying films

for its principal he does this through the bidding system, theatre by theatre.

Discrimination Among Licensees

The amended and supplemental complaint alleges that in licensing films each of the distributor-defendants has discriminated against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits. Of the various contract provisions by which such discriminations are said to have been accomplished, plaintiff sets forth the following in its brief: suspending the terms of a given contract, if a circuit theatre remains closed for more than eight weeks, and reinstating it without liability upon re-opening, Plaintiff's Exhibits 188, 265-6, 383-4, 472-3; allowing large privileges in the selection and elimination of films, Plaintiff's Exhibits 172, 177, 192, 263-6, 383-4, 472; allowing deductions in film rentals if double bills are played, Plaintiff's Exhibits 183-4, 190, 199, 242, 245, 247, 258-9, 262, 264-6, 271-2a, 274, 382-3, 473; granting moveovers and extended runs, Plaintiff's Exhibits 182-2a, 199, 260, 262, 265, 267, 274, 383-4, 474, 476; granting road-show privileges, Plaintiff's Exhibits 187-8, 199, 232, 265-6, 383-4, 472; allowing overage and underage, Plaintiff's Exhibits 190-1, 194, 259, 265-6, 383; granting unlimited playing time, Plaintiff's Exhibits 241, 267, 269, 471; excluding foreign pictures and those of independent procers, Plaintiff's Exhibits 173-4, 181, 190-1, 194, 199, 262, 265-6, 272a, 383-4, 395, 470-2; granting rights to question the classification of features for rental purposes, Plaintiff's Exhibits 187, 232, 259, 265, 472-3; and especially, discriminating in film rentals, clearances, and minimum admission prices, see Plaintiff's Brief pp. 56-70, 75-85.

These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of affiliated and unaffiliated theatres. Record pp. 1432-3; Columbia's Exhibit 9a; Universal's Exhibit 2; Plaintiff's Exhibits 195, 198, 259, 261, 265-6a, 384, 396, 470-3. Small independents are usually licensed, however, upon the standard forms of contract, which do not include them. Record pp. 1432-3; Plaintiff's Exhibits 275-90. The com-

petitive advantages of these provisions are so great that their inclusion in contracts with the larger circuits constitutes an unreasonable discrimination against small competitors in violation of the anti-trust laws. It seems unnecessary to decide whether the record before us justifies a reasonable inference that the distributor-defendants have conspired among themselves to discriminate among their licensees, for each discriminating contract constitutes a conspiracy between the licensee and licensor. *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173.

The defendants argue that these privileges granted to the circuits flow from their negotiations with the individual theatre-owners rather than from a standard policy of discrimination deliberately pursued by them. This is perhaps true, but the result is the same whether the bargaining power of the large exhibitors forces upon the distributors a discriminatory policy, or whether the latter voluntarily carry such a policy into effect. Acquiescence is an unreasonable restraint, as well as the creation of such a restraint, violates the Sherman Act. Under the bidding system we are requiring such discriminations would appear impossible. Those provisions which are not compatible with the operation of this system, or which are inherently unreasonable, such as a provisions for clearance between theatres where there is no substantial competition, will no longer be includible in licenses, as mentioned elsewhere, but otherwise the bidders will compete for licensing contracts on a parity, in that the same offer will be made to all prospective exhibitors in a comumnity.

The foregoing is not to be construed, however, as indicating that the distributor-defendants have discriminated among their licensees with respect to film rentals, clearances, or minimum admission prices. They have perhaps done so, but we are without sufficient knowledge of the many factors entering into the determination of these provisions such as the character of specific communities, the nature of the different theatre appointments, of the patrons, operating policies, locations, and responsibility of operators. In the absence of such facts, we are unable to infer

that the distributor-defendants have violated the Sherman Act in this particular regard, but any discriminations in the other ways noted above in favor of affiliated licensee or licensees connected with independent circuits as against individual independents must be enjoined, and we believe will not exist in future licenses under the bidding sytem for which we are providing.

Divestiture of Theatres

We cannot accede to the prayer of the plaintiff that the major defendants should be divested of their theatres in order that no distributor of motion pictures shall be an exhibitor. Undoubtedly such a step while not *ipso facto* preventing price-fixing agreements or unreasonable clearance would terminate the government's most urgent objection to the present methods of conducting the motion picture business, but it would also withdraw the defendant-distributors from competition in the exhibition field and at the same time would create a new set of theatre owners which would be quite unlikely for some years to give the public as good service as the exhibitors they would have supplanted in view of the latter's demonstrated experience and skill in operating what must be regarded as in general the largest and best equipped theatres. We think that the opportunity of independents to compete under the bidding system for pictures and runs renders such a harsh remedy as complete divestiture unnecessary, at least until the efficiency of that system have been tried and found wanting.

In the year 1945 there were about 18,076 motion picture theatres in the United States of which the five major defendants had interests in 3,137 or 17.35 per cent. Of the latter, Paramount or its subsidiaries owned independently of the other defendants 1935—a little less than half, or about 7.72 per cent; Warner 501, or about 2.77 per cent; Loew's 135, or about .74 per cent; Fox 636, or about 3.52 per cent, and RKO 109, or about .60 per cent. There were 361 theatres or about 2.00 per cent, in which two or more of these defendants had joint interests, whether held directly or indirectly through stock ownership in the same corporation or through a lease or operating agreement. This tabulation excludes

theatres connected with one or more of the defendants through film-buying or management contracts or through corporations in which a defendant owns an indirect minority stock interest. It includes all theatres in which each defendant otherwise owns a direct or indirect interest of any amount. See Loew's Exhibit 2; RKO's Exhibit 11; Plaintiff's Exhibits 8, 9, 12-3, 47-8, 64, 87-8, 97, 100, 118-20, 156-64, 360.

It would seem unlikely that theatre owners having aggregate interests of little more than one-sixth of all the theatres in the United States are exercising such a monopoly of the motion picture business that they should be subjected to the drastic remedy of complete divestiture in order to effect a proper degree of free competition. It is only in certain localities, and not in general, that an ownership even of first-run theatres approximating monopoly exists. Under the proposed system, the only theatres the competition of which in exhibition even Paramount—the largest owner—would in anywise control are the 7.72 per cent which it now owns. Each of the other four major defendants would control a far smaller percentage of the theatres. Even in places like Philadelphia and Cincinnati, where Warner and RKO have owned all the first-run theatres, their theatre interest cannot properly be aggregated to establish a conspiracy in restraining exhibition, for in such localities there would seem to be nothing to prevent other persons from building theatres of a similar type if the market for the distribution of films should be opened to the highest bidder and the builder of a new theatre could compete with the other theatre owners in obtaining pictures for exhibition in the theatre he had built. The only pictures that the present sole exhibitors in such localities could control would be their own, which they can always exhibit freely in their own theatres.

In about 60 per cent of the 92 cities having populations of over 100,000 on which the government mainly relies to prove its case, there are independent first-run theatres in competition with those of the major defendants except so far as it may be restricted by the trade practices we have

criticized.[8] In about 91 per cent of these cities there is competition in first runs between independents and some of the major defendants or among the major defendants themselves, except so far as it may be restricted by the above trade practices.[9] If the bidding system we propose to set up, minimum admission prices in licenses eliminated, and the other restrictive agreements which we have discussed terminated, it is our opinion that adequate competition would exist. Indeed in all of the 92 cities, even where there is no present competition in first runs there is always competition in some run.

Moreover, there is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly, as was the case in *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106, and *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C.C.A. 2). The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition. They can only be restrained from the unlawful practices in fixing minimum prices, obtaining unreasonable clearances, block-booking, and other things we have criticized.

If in certain localities there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not

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[8] According to Loew's Exhibit 13 and RKO's Exhibit 11, there are independent first-run theatres in all but the following 38 cities: Albany, Bridgeport, Charlotte, Chattanooga, Cincinnati, Cleveland, Columbus, Dallas, Dayton, Des Moines, Elizabeth, Erie, Flint, Fort Worth, Grand Rapids, Houston, Jersey City, Kansas City, Mo., Knoxville, Lowell, Memphis, Milwaukee, Minneapolis, Newark, New Haven, Norfolk, Omaha, Paterson, Peoria, Rochester, San Antonio, Scranton, South Bend, Syracuse, Toledo, Wichita, Worcester, Yonkers.

[9] Upon the termination of "pooling" agreements a major defendant may control all of the first-run theatres in only the following 8 cities: Charlotte, Chattanooga, Cincinnati, Erie, Knoxville, Peoria, South Bend, Wichita. Loew's Exhibit 13; RKO's Exhibit 11.

from "inherent vice" on the part of these defendants. Each defendant had a right to build and to own theatres and to exhibit pictures in them, and it takes greater proof than that each of them possessed great financial strength, many theatres, and exhibited the greater number of first-runs to deprive it of the ordinary rights of ownership. Outside the limits of the trade practices and agreements which we have found to violate the anti-trust laws and which will under the final decree be abolished, there is general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures. Record p. 1062.

As was said by the expediting court in *United States* v. *The Pullman Company*, 64 F. Supp. 108, 112, (E. D. Pa., 1945):

> "If there is only one store in a town at which every one trades, that fact does not itself constitute a monopoly in the legal sense. It is only when the merchant maintains his position by devices which compel everyone to trade with him exclusively that the situation becomes legally objectionable."

In the case at bar, as we have reiterated, many of the objections are to the trade practices we have alluded to, and not to the ownership of theatres either by the major defendants or by their wholly-owned subsidiaries. If those theatres were all owned by entirely independent corporations the distributing-producing defendants, if not in competition in the distribution of their films, would control competition in the exhibition business by in the aggregate controlling the distribution of most of the best pictures in the United States and imposing restrictions upon their use. The root of the difficulties we have discovered lies not in the ownership of many or most of the best theatres by the producer-distributors, but in price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents

would effect all of the undesirable results that have existed when the five major defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited. That such would be the case seems amply demonstrated by the decisions where powerful independent circuits were involved. *United States v. Crescent Amusement Co.*, 323 U. S. 173; *Interstate Circuit, Inc., v. United States*, 306 U. S. 208. If the objectionable trade practices were eliminated, the only difference between such an assumed situation in which the defendants owned no theatres and the present would be the inability of the major defendants to play their own pictures in their own theatres. The percentage of pictures on the market which any of the five major defendants could play in its own theatres would be relatively small and in nowise approximates a monopoly of film exhibition.[10]

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[10] The following table is derived from Plaintiff's Exhibit 426 and Record pp. 2400-1:

FEATURE FILMS RELEASED DURING THE 1943-44 SEASON BY ALL DISTRIBUTORS

	No. of Films	Percentages of Total	
		With "Westerns" included:	With "Westerns" excluded:
Fox	33	8.31%	9.85%
Loew's	33	8.31%	9.85%
Paramount	31	7.81%	9.25%
RKO	38	9.57%	11.34%
Warner	19	4.79%	5.67%
Columbia	41	10.32%	12.24%
United Artists	16	4.04%	4.78%
Universal	49	12.34%	14.63%
Republic	(29 features (30 "Westerns"	14.86%	8.66%
Monogram	(26 features (16 "Westerns"	10.58%	7.76%
PRC	(20 features (16 "Westerns"	9.07%	5.97%
Totals	397	100%	100%
	335 without "Westerns"		

There has however been restraint of competition in exhibition by the five major defendants through ownership of theatres jointly with one another or if their interests be more than five per cent even where jointly held with independents which, in our opinion, calls for a divestiture of such interests whether such partial interest is in fee or through stock ownership or otherwise.

There is no evidence that in a city such as Cincinnati, in which a major defendant owns all of the first-run theatres, other exhibitors, affiliated or unaffiliated, have been prevented from also owning theatres for exhibition on first-run and there consequently is no monopoly in the legal sense, see *United States* v. *Pullman Company*, 64 F. Supp. 108, 112, and no reason for directing a divestiture. But when theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. In such case their joining of interests is illegal under the anti-trust laws for the reason that the major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently. Such an elimination of competition is unreasonable in view of the defendant's being a powerful factor in the industry capable of exerting vast influence to its ends, and of the methods it has employed to restrain and control normal competition in distributing and exhibiting motion pictures through price-fixing, system of clearances, block-booking, pooling and the other practices we have alluded to.

We find such joint interests in a great number of theatres, a summary of which is set forth below,[11] and hold that they

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[11] In so far as information could accurately be obtained from RKO's Exhibit 11, the numbers of theatres jointly owned by the defendants are approximately as follows:

THEATRES JOINTLY OWNED WITH INDEPENDENTS:

Paramount	993
Warner	20
Fox	66
RKO	187
Loew's	21

must be terminated by a sale to, or purchase from the co-owner or owners, or by a sale to a party not one of the other defendant-exhibitors. The decree or subsequent orders to be entered in conformity with this opinion will control sales or exchanges of such fractional interests for the purpose of restoring or creating a reasonable competition in the areas in question.

General Considerations

It may be said that such restrictions in commercial dealings as we would impose will interfere with the right of a copyright owner to choose his customers or contract for the disposition of his own property. The answer is that no such absolute right exists where its exercise will involve an extension of a copyright monopoly or an unreasonable interference with competition in the distribution and exhibition of moving pictures. A system of fixed admission prices, clearances and block-booking is so restrictive of competition

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THEATRES JOINTLY OWNED BY TWO DEFENDANTS:

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25
Paramount-RKO	150
Loew's-RKO	3
Loew's-Warner	5
Fox-RKO	1
Warner-RKO	10
Total	1,501 Theatres

Of the above theatres jointly owned with independents, the following numbers will not be affected by the decree, since the defendant or co-owning independent owns less than a 5% interest:

Paramount	177	
RKO	32	
Total		209 Theatres

Total affected by the decree according to RKO's Exhibit 11 ..... 1,292 Theatres

in its tendency that it should be modified to comply with the terms of the Sherman Act. The modifications in practices we have indicated will relieve conditions that have grown up through the years. Indeed the practices are defended on the ground that business convenience and long usage ought to sanction them. But, in spite of their long continuance, we cannot escape the conclusion that in various ways the system stifles competition and violates the law and that business convenience and loyalty to former customers afford a lame excuse for depriving others of rights to compete and for perpetuating unreasonable restrictions. The remedy we are giving against the infractions is certainly no more drastic in effect than the one the Supreme Court granted in *Interstate Circuit* v. *United States,* 306 U. S. 208, nor more severe than the one it imposed in *United States* v. *Crescent Amusement Co.,* 323 U. S. 173. The defendants have built up great business enterprises in a very popular field. Yet they have carried on practices we have found unduly restrictive of interstate commerce and even though we do not suggest that they any more than "those eighteen upon whom the tower in Siloam fell" have been "sinners above all men," yet measures should be taken to restore the moving picture business to a condition of competition that will benefit both competitors and the general public and to abate practices that are unlawful.

It is argued that the steps we have proposed would involve an interference with commercial practices that are generally acceptable and a hazardous attempt on the part of judges—unfamiliar with the details of business—to remodel its delicate adjustments which have hitherto provided the public with what is a new and great art. But we see nothing ruinous in the remedies proposed. Disputes which may arise under the bidding system are likely to relate to questions whether the bidder has a theatre adequate for the run for which he bids, whether the clearance requested is reasonable as regards his own theatre and those of others, and similar matters generally involved in comparing bids. If the defendants will consent to an arbitration system for the determination of such disputes of the kind that has worked so well under the consent decree, they will facilitate the

adjustment of most of the differences that are likely to occur, with a large saving of time and money as compared with separate court actions.

A suit in the district court for violation of the Sherman Act is doubtless an awkward way to cure such ills as have arisen, but it is perhaps the best remedy now available to the government. There surely are evils in the existing system, and the Sherman Act provides a mode of correction which is lawfully invoked. At all events, that which is written is written, and is controlling on us.

It does not follow from the foregoing that we should wholly break up the exhibition business of each of the major defendants even though a "root and branch" decree might be legally possible. Such total divestiture would be injurious to the corporations concerned, and, if we are right in our analysis of the situation, we should still have to give relief against price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agreements, and other agreements we have held invalid. The relief proposed we believe should suffice, while total divestiture would be damaging to the public as well as to the defendants and not accomplish any useful purpose at the present time.

The Decree

A decree is granted in accordance with the views expressed in the foregoing opinion to be settled on ten days' notice. It should provide for the dismissal of all claims asserted by the plaintiff against any of the defendants which act only as producers of motion pictures and for the dismissal of claims against any other defendants based on their acts as producers, whether as individuals or in conjunction with others.

The granting of licenses by any of the defendant-distributors which fix minimum prices for admission to theatres either of the defendants or of any other exhibitor should be enjoined in which such minimum admission prices are fixed by the parties either in writing, or through a committee, or through arbitration, or upon the happening of any event, or in any other wise.

The defendants should be enjoined from concertedly agreeing to maintain a system of clearances as among themselves or with other exhibitors, and no clearances should be granted against theatres in substantial competition with the theatre receiving a license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Existing clearances in excess of what is reasonably necessary to protect the licensees in the runs awarded to them shall be invalid pro tanto. In determining what is a reasonable clearance the following factors should be taken into consideration:

(1) The admission prices of the theatres involved, as set by the exhibitor;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

The further performance by any of the defendants of existing formula deals, master agreements to the extent that we have previously found them invalid, or franchises should be enjoined, and the defendants should also be enjoined from entering into or carrying out any similar agreements in the future.

Defendants owning a legal or equitable interest in theatres of ninety-five per cent or more either directly or

through subsidiaries may exhibit pictures of their own or of their wholly owned subsidiaries in such theatres upon such terms as to admission prices and clearances and on such runs as they see fit.

No defendant or its subsidiaries shall exhibit its films other than on its own behalf or through wholly owned subsidiaries, or subsidiaries in which it has an interest of at least ninety-five per cent, without offering the license at a minimum price for any run desired by the operators of each theatre within the competitive area. The license desired shall in such case be granted to the highest responsible bidder having a theatre of a size and equipment adequate to show the picture upon the terms offered. The license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers, or any person whatever. Each license shall be offered and taken theatre by theatre and picture by picture. No contracts for exhibition shall be entered into, or if already outstanding shall be performed, in which the license to exhibit one feature is conditioned upon an agreement of the licensee to take a license of one or more other features, but licenses to exhibit more than one feature may be included in a single instrument provided the licensee shall have had the opportunity to bid for each feature separately and shall have made the best bid for each picture so included. To the extent that any of the pictures have not been trade-shown prior to the granting of a license for more than a single picture, the licensee shall be given by the licensor the right to reject a percentage of such pictures not trade-shown prior to the granting of the license to be fixed by the decree. But that right to reject any picture must be exercised within ten days after there has been an opportunity afforded to the licensee to inspect it.

The defendants shall be enjoined from entering into or continuing to perform existing pooling agreements whereby given theatres of two or more exhibitors, normally in competition, are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee, or by one of the exhibitors, or whereby profits of the "pooled" theatres are divided among the owners according to pre-agreed percentages. They shall also be enjoined from making or continuing to perform

agreements that the parties may not acquire other theatres in the competitive area without first offering them for inclusion in the pool. The making or continuance of leases of theatres under which defendants lease any of their theatres to another defendant or to an independent operating a theatre in the competitive area in return for a share of the profits shall be enjoined.

Each defendant shall cease and desist from ownership of an interest in any theatre, whether in fee or in stock or otherwise, in conjunction with another defendant-exhibitor. Each defendant shall cease and desist from ownership, jointly with an independent, of an interest in any theatre, greater than five per cent, unless such defendant's interest is ninety-five per cent or more; and where the interest of such defendant is more than five per cent and less than ninety-five per cent, such joint interests shall be dissolved either by a sale to, or by a purchase from, such co-owner or co-owners. Rearrangements of such joint interests with an independent, if by purchase, shall, however, be subject to the direction of this court so that their effectuation may promote competition in the exhibition of motion pictures. Where a defendant owns a ninety-five or greater per cent interest in any theatre, such theatre may be considered as its own so far as this opinion and the decree to be entered hereon are concerned. Each of the defendants shall be enjoined from expanding its theatre holdings except for the purpose of acquiring a co-owner's interest in jointly owned theatres, and this only in cases where the court shall permit such acquisition, instead of requiring an outright sale of the undivided interest of the defendant in question. The foregoing provision as to divestiture of partial interests in theatres shall apply both to interests held in fee and beneficially and to those represented by shares of stock. But it shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the latter case, this court or other competent authority shall approve the acquisition after due application is made therefor.

Each defendant shall be enjoined from operating, booking or film-buying through any agent who is also acting in such matters for any other exhibitor, independent or affiliated.

The decree shall also provide for arbitration of disputes as to bids, clearances, runs, and any other subjects appropriate for arbitration in respect to all parties who may consent to the creation of such tribunals for adjustment of such disputes. It shall also provide for an appeal board generally similar to the one created by the consent decree as to any parties consenting thereto. It shall make such disposition of the provisions of the existing consent decree signed November 30, 1940, as may be necessary in view of the foregoing opinion.

In order to secure compliance with the decree to be entered, duly authorized representatives of the Department of Justice shall on the written request of the Attorney General or the Assistant Attorney General in charge of anti-trust matters, and on reasonable notice to the defendant or defendants affected, be permitted reasonable access to all books and papers of the defendants and reasonable opportunity to interview their officers, or employees, as provided in Section XVIII of the Consent Decree.

Proceedings under the decree to be entered shall be stayed pending appeal or for the purpose of enabling the parties to adjust their business without an unfair burden or as practice may require upon such terms as the decree shall provide.

Jurisdiction of this cause shall be retained for the purpose of enabling any of the parties to the decree to apply to the court at any time for such orders or directions as may be necessary or appropriate for the construction or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

Findings should be proposed by the parties for the assistance of the court, but such proposed findings will form no part of the record.

Dated June 11, 1946.

AUGUSTUS N. HAND,
U. S. Circuit Judge.
HENRY W. GODDARD,
U. S. District Judge.
JOHN BRIGHT,
U. S. District Judge.

APPENDIX "B"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

against

PARAMOUNT PICTURES, INC., *et al.*,
Defendants.

MEMORANDUM IN RE FINDINGS AND DECREE

In order to meet some of the objections raised at the hearing to the system of bidding for features described in the opinion of the court, we have modified the system there proposed so that competitive bidding will only be necessary within a competitive area and in such an area where it is desired by the exhibitors. In other words, the decree provides an opportunity to bid for any exhibitor in a competitive area who may desire to do so.

The arrangement for arbitration and an appeal board has been terminated except as to unfinished litigations and other matters referred to in the decree, because of the unwillingness of some of the parties to consent to their continuance. Nevertheless, as we have indicated in the opinion, these tribunals have dealt with trade disputes, particularly those as to clearances and runs, with rare efficiency, as both government counsel and counsel for other parties have conceded.

Indeed, the arbitration system set up under the consent decree of November 20, 1940, was created pursuant to the prayer of the amended and supplemental complaint by the United States filed November 14, 1940, in which, among other things, the plaintiff prayed that "a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure

adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein."

We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree.

Dated: December 31, 1946.

AUGUSTUS N. HAND,
United States Circuit Judge.

HENRY W. GODDARD,
United States District Judge.

JOHN BRIGHT,
United States District Judge.

APPENDIX "C"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,
against

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION,
Defendants

Equity No. 87-273

Decree

The court having rendered its opinion herein on June 11, 1946, having duly considered the proposals of the parties and of *amici curiae* as to its findings and judgment, and having filed its findings of fact and conclusions of law, wherein certain of the defendants herein were found to have violated the Act of Congress approved July 2, 1890, 26 Stat. 209, commonly known as the Sherman Act,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

I

1. The complaint is dismissed as to the defendants Screen Gems, Inc. and the corporation named as Universal Pictures Company, Inc., merged during the pendency of this case into the defendant Universal Corporation. The complaint is also dismissed as to all claims made against the remaining defendants herein based upon their acts as producers, whether as individuals or in conjunction with others.

II

Each of the defendant distributors, Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loews, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Picutres, Inc.; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation [formerly known as Vitagraph, Inc.]; Twentieth-Century Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation; and the successors of each of them, and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal" covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing in the future any feature for exhibition in any theatre, not its own, in any manner except the following:

(a) A license to exhibit each feature released for public exhibition in any competitive area shall be offered to the operator of each theatre in such area who desires to exhibit it on some run [other than that upon which such feature is to be exhibited in the theatre of the licensor] selected by such operator, and upon uniform terms;

(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;

(c) Where a run is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify, not less than thirty days in advance of the date when bids will be received, all exhibitors in the competitive area, offering to license the features upon one or more runs, and in such offer shall state the amount of a flat rental as the minimum for such license for a specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for each such run. Within fifteen days after receiving such notice, any exhibitor in such competitive area may bid for such license, and in his bid shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make. The distributor may reject all offers made for any such feature, but in the event of the acceptance of any, the distributor shall grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equip-

ment adequate to yield a reasonable return to the licensor. The method of licensing specified in this subdivision shall not be required in areas where there is no competition among theatres or in run, or in which there is no offer made by any exhibitor within the time above mentioned. The words "exclude simultaneous exhibition" shall be held to mean the exhibition of a specified run in one theatre with clearance over other theatres in the competitive area. The words "competitive area" shall refer to the territory occupied by more than one theatre in which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of features on any run.

(d) Each license shall be offered and taken theatre by theatre and picture by picture.

(e) A theatre is not a defendant's own theatre unless it owns therein a legal or equitable interest of ninety-five per cent or more, either directly or through affiliates or subsidiaries.

9. From arbitrarily refusing the demand of an exhibitor, who operates a theatre in competition with another theatre not owned or operated by a defendant distributor, or its affiliate or subsidiary, made by registered mail, addressed to the home office of the distributor, to license a feature to him for exhibition on a run selected by the exhibitor, instead of licensing it to another exhibitor for exhibition in his competing theatre on such run. Such demand shall be deemed to have been refused either upon the receipt by the exhibitor of a refusal in writing or upon the expiration of ten days after the receipt of the exhibitor's demand.

III.

Each of the defendant exhibitors, Paramount Pictures, Inc., Loew's, Incorporated, Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation, Warner Bros. Pictures, Warner Bros. Circuit Management Corporation,

Twentieth Century Fox Film Corporation, and National Theatres, Inc., is hereby enjoined and restrained:

(1) From performing or enforcing agreements referred to in paragraphs 5 and 6 of the foregoing section II hereof to which it may be a party.

(2) From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

(3) From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

(4) From making or continuing leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share of the profits.

(5) From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or otherwise, in conjunction with another defendant, and from continuing to own or acquire such an interest in conjunction with an independent [meaning any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question,] where such interest shall be greater than five per cent unless such interest shall be ninety-five per cent or more. The existing relationships which violate this provision shall be terminated within two years. The relationships between the defendants and independents which violate this provision shall be terminated by a sale to, or purchase from the co-owner or co-owners, or by a sale to a party not one of the other defendants. In dissolving relationships among defendants and between defendants and independents which violate this provision, one defendant may acquire the interest

of another defendant or independent if such defendant desiring to acquire such interest shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures. Each of the defendants shall submit to this court within six months a statement outlining the extent to which it has complied and the manner in which it proposes to comply with this provision, setting forth in detail the names, locations, and general descriptions of the theatres, corporate securities, and beneficial interests of any kind involved, the sales thereof that it has made, and such interests as it proposes to acquire, with a statement of facts regarding each competitive situation involved in such proposed acquisition sufficient to show the probable effect of such acquisition on that situation. Similar reports shall be made quarterly thereafter until this provision shall have been fully complied with. Reasonable notice of such acquisition plans shall be served upon the Attorney General and plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the court.

(6) From expanding its present theatre holdings in any manner whatsoever except as permtited in the preceding paragraph.

(7) From operating, booking, or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

IV.

Nothing contained in this Decree shall be construed to limit, in any way whatsoever, the right of each distributor-defendant to license, or in any way to arrange or provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such distributor-defendant has or may acquire pursuant to the terms of this Decree, a proprietary interest of ninety-five per cent or more either directly or through subsidiaries.

V.

The provisions of the existing consent decree are hereby declared to be of no further force or effect, except insofar as may be necessary to conclude arbitration proceedings now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable. But this shall in no way preclude the parties or any other persons from setting up a reasonable system of arbitration either through the use of the present boards or any others as among themselves.

VI.

For the purpose of securing compliance with this Decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant as its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present.

Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice,

except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

VII.

Paragraphs 7 and 8 of section II of this judgment shall not become effective until July 1, 1947.

VIII.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the judgment and no others, to apply to the court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

IX.

The operation of this judgment is stayed for sixty days from the date hereof, and, if an appeal is taken, for thirty days thereafter in order to enable any appellant to move before the Supreme Court for a stay in respect to any portion of the judgment from which an appeal has been taken.

Dated, December 31, 1946.

AUGUSTUS N. HAND
United States Circuit Judge
HENRY W. GODDARD
United States District Judge
JOHN BRIGHT
United States District Judge

United States District Court

SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA,
Plaintiff,

against

PARAMOUNT PICTURES INC., et al.,
Defendants.

MEMO. ENDS

MOTION

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FILED
FEB 8 1947
S. D. OF N. Y.

Motions denied as to 1, 3 and 4 granted as to 2(a) and (b) by extending the time of dissolution and termination to July 1 1947. So that paragraph III (2) of the decree is modified by adding at the end thereof the following:

"The Pooling agreement by one or more defendants with others not parties to this action which violates the provisions shall be dissolved prior to July 1, 1947."

Paragraph III (4) of the decree is modified by adding at the said thereof the following:

"The leases agreed to herein between a defendant and independents which violates the provision shall be terminated prior to July 1 1947.

February 3 1947 Settle order on notice

Augustus N. Hand U.S.D.J.
Harold Medina D.J.
John Bright D.J.

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United States v. *Reading*, 226 U. S. 324 ..... 2, 10
Westway Theatres v. *Twentieth Century-Fox*, 30 Fed. Supp. 830 7
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STATUTES

Constitution of the United States:
Fifth Amendment 2
Copyright Act of March 4, 1909 (17 U. S. C. A., Secs. 4 and 5 2
Expediting Act of February 11, 1903 (15 U. S. C., Sec. 29) 1, 2
Judicial Code, Section 238 (28 U. S. C., Sec. 345) 2
Sherman Act of July 2, 1890 (15 U. S. C., Secs. 1, 2, 4 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1352

UNITED ARTISTS CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States as amended, defendant-appellant United Artists Corporation submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on December 31, 1946. A petition for appeal was filed in the District Court on February 20, 1947, and was allowed by order of the same date.

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903 as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 15

U. S. C., § 29), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C., § 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Crescent Amusement Co.*, 323 U. S. 173;

United States v. *Bausch & Lomb Optical Co.*, 321 U. S. 707;

Interstate Circuit, Inc. v. *United States*, 306 U. S. 208;

Paramount Famous Lasky Corporation v. *United States*, 282 U. S. 30;

United States v. *American Tobacco Co.*, 221 U. S. 106;

United States v. *Reading*, 226 U. S. 324.

Statutes Involved

The Sherman Act of July 2, 1890, 27 Stat. 209, as amended (15 U. S. C., §§ 1, 2, 4).

Constitution of the United States—Fifth Amendment.

The Copyright Act of March 4, 1909 (35 Stat. L. Pt. 1, pp. 1075-1088), as amended August 24, 1912 (37 Stat. L. Pt. 1, pp. 488-490) (U. S. C. A., Title 17, § 4 and § 5).

The Issues and the Rulings Below

The original complaint in this action was filed on or about the 20th day of July, 1938. An amended complaint was filed on November 14, 1940. In these complaints the Government sued eight of the principal producers and distributors of motion pictures in the United States (including appellant), claiming a violation of Sections 1 and 2 of the Sherman Anti-Trust Act and charging the defendants with having combined and conspired with each other in the production, distribution and exhibition of motion pictures in the United States. Five of the defendants

(Paramount Pictures, Inc., RKO Radio Pictures, Inc., Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corporation and Loew's Incorporated) are engaged in the production, distribution and exhibition of motion pictures; that is to say, in addition to producing and distributing motion pictures they own and operate respectively chains of theatres and occasionally referred to as "major" defendants.

The three other defendants (which includes appellant) (Columbia Pictures Corporation, Universal Pictures Company, Inc. and United Artists Corporation) do not own or operate theatres.

Plaintiff alleged that the illegal restraints were brought about by reason of (1) franchise agreements, under which the defendants granted exhibitor the right to exhibit pictures of more than one season's product; (2) pooling arrangements, under which the major defendants pooled their theatres with each other or with third parties; (3) block booking, under which defendants sold a season's product in advance of production; (4) preferential run, by which defendants' theatres were favored with respect to first run exhibitions and obtained a monopoly of the playing time in the better theatres; (5) unreasonable clearance, by means of which defendants' theatres obtained more protection than was necessary in the exhibition of their pictures as a consequence of which independent theatres were relegated to an inferior and unprofitable run; (6) minimum admission prices, under which the defendants compelled independent exhibitors to keep up admission prices, thereby resulting in a favored position to the affiliated theatres. By its answer appellant denied each and every conclusory allegation of wrongdoing and each and every allegation of fact in support thereof.

While complaining of all of these practices in the industry and seeking injunction, the Government also demanded

that the five major defendants be divested of their holdings in their theatres, and that they be compelled to confine themselves in the future only to the production and distribution of motion pictures.

The first trial of this case was commenced on June 3, 1940, and lasted a week. Before any testimony was taken, however, the parties got together at the suggestion of Judge Henry Goddard, who presided, and a consent decree was finally agreed upon between the five major defendants and the Government and was filed November 20, 1940. The three minor defendants (Columbia, United Artists and Universal) refused to be a party to such consent decree. Under that consent decree the consenting defendants agreed to trade-show their pictures and to license them in blocks of no more than five. A system of arbitration was instituted under which exhibitors complaining of unreasonable clearance were given an opportunity to arbitrate that question. That decree was to be in effect for three years, after which the Government was at liberty to go on with the trial. Columbia and Universal continued to license their season's product in advance as theretofore. (United Artists, merely acting as an agency for independent producers, has never block-booked.)

At the expiration of the three-year period the Government decided to continue with the trial. It asked for and obtained an order for an Expediting Court, and Circuit Judge Augustus N. Hand, together wtih District Judges Henry Goddard and John Bright, were appointed as such court and have acted as such ever since.

On October 8, 1945, the trial of the case was resumed before the Expediting Court. It lasted until November 20, 1945. The Government abandoned any attempt to prove a monopoly in production of motion pictures. In attempting to prove the other allegations of its amended complaint the Government confined itself to the production of sta-

tistics, data, contracts and correspondence theretofore furnished to it for the most part by the defendants themselves pursuant to interrogatories. It called no witnesses whatever. There are approximately 400 exhibits in the case.

The trial having concluded on November 20, 1945, briefs were thereafter submitted by the parties in January, 1946. On July 11, 1946, the District Court handed down its opinion, in which it found each and all of the defendants to have violated Sections 1 and 2 of the Sherman Act. In effect it held that all of the usages and customs heretofore enumerated and of which the Government complained were illegal and should be restrained. The Court, however, stated that it felt that divestiture was too drastic a remedy, and it refused the Government's plea in that respect. This opinion is annexed hereto as Appendix "A".

Thereafter appellant, the Government and the other defendants submitted proposed findings and decree. Appellant submitted forty-four findings and two conclusions of law. Hearings were held by the Court on the proposed findings and decree, and on December 31, 1946, the Court made and filed its findings of fact and conclusions of law and its decree. Concurrently with the filing of the findings and decree on December 31, 1946, the Court filed a supplementary opinion, a copy of which is hereto annexed as Appendix "B". The decree substantially follows the Court's June opinion (Exhibit "A").

On January 10, 1947, appellants filed a motion pursuant to Rule 52(b) of the Rules of Civil Procedure:

1

To strike out the last sentence of paragraph 4 of Section H, and that said paragraph shall read as follows:

> "4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of

what is reasonably necessary to protect the licensee in the run granted."

2

To amend Section VII to read as follows:

"Paragraph 7 of Sect. II of this Judgment shall not become effective until July 1, 1947.

Paragraphs 8(a) and 8(c) of Sect. II of this Judgment shall not become effective until July 1, 1947, but in the event of an Appeal to the Supreme Court by any party from these Paragraphs, such Paragraphs shall not become effective until ninety (90) days after the entry of final Judgment upon the mandate of the Supreme Court."

In that month the other defendants filed various motions to amend the findings and decree. On February 3, 1947, these motions were denied in part and granted in part, as appears by the short memorandum opinions handed down by the Court and hereto annexed as Appendix "C." Appellant's motion was denied in toto.

The Questions Involved Are Substantial

The questions raised by this appeal relate to the sufficiency of the evidence upon which the Court made its findings of fact and conclusions of law to support the conclusions that the appellant United Artists Corporation violated the Sherman Act, and the propriety of the relief granted by the District Court and the power of the Court to grant such relief.

1. The first substantial question raised by this appeal involves the propriety of an injunction which deprives the appellant United Artists Corporation from granting any license for the exhibition of its motion pictures in which the minimum admission price to be charged by such license is stipulated in the license agreement.

The appellant United Artists Corporation as the copyright proprietors of its motion pictures does not at any time in its license agreement with the licensee part with title. In the case at bar no commodity is sold, no resale price is fixed. The exhibition license is in the nature of a performing right; that is, the *res* is a copyrighted motion picture. To protect the reward the distributor, the proprietor of the copyright, has stipulated with the licensee the minimum admission price to be charged for the exhibition of the copyrighted motion picture in the exhibitor's theatre. The Court has held this to be illegal, despite the fact that the undisputed evidence is that the exhibitor determined the actual admission price charged at his theatre and that such admission price did not vary with the particular picture exhibited, and no inference should have been drawn that the stipulation of a minimum admission price in the license agreement made the defendants guilty of a conspiracy to fix theatre admission prices.

The Court, in enjoining the making and performances of such licenses, has deprived the appellant of well established property rights as well as rights conferred by the Copyright Law.

Black v. *Henry G. Allen Co.*, 42 Fed. 618;
Bement v. *National Harrow Co.*, 181 U. S. 70;
U. S. v. *General Electrical Co.*, 272 U. S. 476;
Interstate Circuit, Inc., v. *U. S.*, 306 U. S. 208;
Westway Theatres v. *Twentieth Century-Fox*, 30 Fed. Supp. 830.

2. The second substantial question involved relates to the propriety of the finding of this Court on the evidence before it, that the appellant United Artists Corporation has acted in concert with the distributor defendants in the formation of a uniform system of clearances for the theatres to which it licensed its films. The Court inferred a conspiracy

among the distributor defendants from similarity of clearance granted to a given exhibitor by the various defendant exhibitors. The undisputed evidence showed that this similarity was due entirely to competitive factors rather than to any agreement or understanding amongst the distributor defendants.

3. The third substantial question involved in this appeal is the propriety of the Court's enjoining clearance which was reasonably calculated to protect the licensor's revenue and confining clearance agreements in the future to those calculated to protect the licensee in the run granted. The undisputed evidence is that the distributor has a legitimate interest of its own to protect. The Court specifically found in its Findings of Fact Nos. 77 and 78 that clearance reasonable in time and area was essential in the distribution as well as in the exhibition of motion pictures.

It was erroneous for the Court to decree that, whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden of proof shall be upon the distributor to sustain the legality thereof. This completely changes the fundamental rule of evidence that the one who alleges should have the burden of proving. There is no evidence in this case to warrant such a change in the rules of evidence by judicial fiat and such attempts by the Court to place the burden of proof upon one of the parties to a decree has been rejected by the Supreme Court (*Hartford Empire Co. v. U. S.*, 323 U. S. 386, 432).

4. The fourth substantial question involved in this appeal is the propriety of a decree enjoining the appellant United Artists Corporation from taking into consideration as one of the factors in determining to whom to license its pictures the fact that the appellant United Artists Corporation has had satisfactory relationships with such exhibitor in the past, and which deprives those old customers

of competitive advantages legitimately acquired through longstanding satisfactory business relationships.

The effect of this is to take away from the appellant United Artists Corporation, the copyright proprietor of motion pictures, the right to designate the goods it is willing to sell, and to choose its own customers, and the right of those customers to continue business relations with the appellant (*United States* v. *Colgate*, 250 U. S. 300; *Great Atlantic and Pacific Tea Co.* v. *Cream of Wheat*, 227 Fed. 46; *Westway* v. *Twentieth Century-Fox*, 113 F. (2d) 932; *Federal Trade Commission* v. *Grate*, 253 U. S. 421; *Greater N. Y. Film Rental Co.* v. *Biograph*, 203 Fed. 39).

5. The fifth substantial question involves the propriety of a decree enjoining the defendants from performing any existing franchises to which it is a party or from making any franchises in the future.

The Court erred in concluding such agreements to be illegal *per. se.* The evidence shows as to franchises that this type of licensing agreement or series of licensing agreements entered into with an exhibitor for more than one picture season covering the exhibition of pictures released by one distributor during the entire period of the agreement, insured the independent exhibitor product for his theatre, did not restrain trade, and provided the non-theatre-owning defendants additional outlets for their product.

6. The sixth substantial question involved in this appeal concerns the propriety of making regulations and restrictions with respect to the licensing of appellant's pictures by setting up what it has described as a system of competitive bidding. This regulatory system is set out in detail in paragraphs 7, 8 and 9 of Section II of the decree.

The Sherman Act provides for injunctions against the continuance of practices found unlawful; it does not author-

ize the Court to prescribe affirmative ways of doing business. This is a legislative function, not a judicial one.

United States v. *Pullman*, 50 Fed. Supp. 123, 136;
United States v. *Reading Company*, 183 Fed. 459, aff'd and md. 226 U. S. 324;
Hartford Empire Company v. *United States*, 323 U. S. 386.

The extent to which the Court's findings and judgment rest on these erroneous rulings raises substantial questions which should be reviewed by this Court. Appellant United Artists Corporation is of the belief that all the questions here raised are substantial and respectfully petitions this Court to pass on them after plenary hearing.

Respectfully submitted,

O'Brien, Driscoll & Raftery,
Counsel for United Artists Corporation,
Appellant.

T. Newman Lawler,
Of Counsel.

APPENDIX "A"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff*,

against

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION, *Defendants*

Opinion

Before Augustus N. Hand, Circuit Judge; Henry W. Goddard and John Bright, District Judges

This is a suit to secure equitable relief against the alleged domination and control by the defendants and their affiliates of the motion picture industry in contravention of Sections 1 and 2 of the Sherman Anti-Trust Act. Decree granting partial relief to plaintiff.

Wendell Berge, Assistant Attorney General; Robert L. Wright, Philip Marcus, Elliott H. Meyer, and John R. Niesley, Special Assistants to the Attorney General; Frank W. Gaines, Jr., Gerald A. Herrick, Robert B. Hummel, Harold Lasser and Horace T. Morrison, Special Attorneys for United States of America.

Simpson Thacher & Bartlett, Attorneys for Paramount Defendants; Whitney North Seymour, Louis Phillips, Albert C. Bickford and Armand F. MacManus, Counsel.

Davis Polk Wardwell Sunderland & Kiendl; J. Robert Rubin, Attorneys for Defendant Loew's, Inc.; John W. Davis, J. Robert Rubin, C. Stanley Thompson, Benjamin Melniker and S. Hazard Gillespie, Jr., Counsel.

George S. Leisure, Ralstone R. Irvine, Granville Whittlesey, Jr., and Gordon E. Youngman, Attorneys for Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation and RKO Midwest Corporation; Roy W. McDonald, and Donovan Leisure Newton & Lumbard, Counsel.

Joseph M. Proskauer and Robert W. Perkins, Attorneys for the Warner Defendants; Joseph M. Proskauer, Robert W. Perkins, J. Alvin Van Bergh and Howard Levinson, Counsel.

Dwight, Harris, Koegel & Caskey, Attorneys for Twentieth Century-Fox Film Corporation and National Theatres Corporation, Defendants; John F. Caskey and Frederick W. R. Pride, Counsel.

Schwartz & Frohlich, Attorneys for Defendant Columbia; Louis D. Frohlich, Arthur H. Schwartz, Irving Moross and Max H. Rose, Counsel.

Charles D. Prutzman, Attorney for the Universal Defendants.

O'Brien, Driscoll & Raftery, Attorneys for the Defendant United Artists Corporation; Edward C. Raftery, Arthur F. Driscoll, Chas. D. Prutzman, George A. Raftery and Adolph Schimel, Counsel.

AUGUSTUS N. HAND, Circuit Judge:

The United States brought suit under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies", commonly known as the Sherman Act, in order to prevent alleged violations by the defendants of Sections 1 and 2 of that Act.

The following is a general description of the defendants:

1. (a) Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 1501 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Paramount Film Distributing Corporation, a wholly owned subsidiary of Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1501 Broadway, New York, New York, and is engaged in the distribution branch of the industry.

2. Loew's, Incorporated, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1540 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

3. (a) Radio-Keith-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

(b) RKO Radio Pictures, Inc., a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the production and distribution branch of the industry.

(c) Keith-Albee-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New

York, New York, and is engaged in the business of exhibiting motion pictures. Approximately 99% of its common stock and 33% of its preferred stock are held by Radio-Keith-Orpheum Corporation.

(d) RKO Proctor Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

(e) RKO Midwest Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Ohio, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

4. (a) Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 321 West 44th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Vitagraph, Inc., a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and is engaged in the business of distributing motion pictures.

(c) Warner Bros. Circuit Management Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and, among other things, acts as booking agent for the exhibition interests of the said Warner Bros. Pictures, Inc.

5. (a) Twentieth Century-Fox Film Corporation is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 444 West 56th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) National Theatres Corporation is owned and controlled by Twentieth Century-Fox Film Corporation, and is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 2854 Hudson Boulevard, Jersey City, New Jersey, and is a holding company for the theatre interests of the said Twentieth Century-Fox Film Corporation.

6. (a) Columbia Pictures Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Screen Gems, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of California, with a place of business at 700 Santa Monica Boulevard, Hollywood, California, and is engaged in the business of producing motion pictures.

(c) Columbia Pictures of Louisiana, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of Louisiana, with a place of business at 150 South Liberty Street, New Orleans, Louisiana, and is engaged in the business of distributing motion pictures.

7. (a) Universal Corporation is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 1250 Sixth Avenue, New

York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

(b) Universal Pictures Company, Inc., a subsidiary controlled by Universal Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of producing motion pictures.

(c) Universal Film Exchanges, Inc., a wholly owned subsidiary of Universal Pictures Company, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

(d) Big U Film Exchange, Inc., a wholly owned subsidiary of Universal Corporation and Universal Pictures Company, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

8. United Artists Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in distribution of motion pictures in various parts of the United States and in foreign companies.

The five major defendants—Paramount Pictures, Inc., Loew's, Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., and Twentieth Century-Fox Film Corporation, and their subsidiaries—were charged in the amended and supplemental complaint with combining and conspiring unreasonably to restrain trade and commerce in the production, distribution and exhibition of motion pictures and to monopolize such trade and commerce in violation of the Sherman Act. The three minor defend-

ants—Columbia Pictures Corporation, Universal Corporation, and their subsidiaries, which are producers and distributors, and not exhibitors, and United Artists Corporation, which is a distributor only, were likewise charged with combining and conspiring with the five major defendants and with each other unreasonably to restrain and to monopolize trade and commerce in motion pictures. As it appeared upon the trial that there was no violation of the Sherman Act in respect to production of motion pictures and that there was on the contrary active competition in production, the charge in respect to production was formally abandoned by the plaintiff. The issues therefore are whether there has been illegal restraints or monopolization in the distribution and exhibition of motion pictures.

The plaintiff contends that an illegal conspiracy and monopoly were effected by: (1) concertedly fixing the license terms before the licensees have had a fair opportunity to estimate the value and character of the films licensed and before such films were completed or shown; (2) concertedly fixing the run, clearance, and minimum admission price terms on which an exhibitor may show pictures through license agreements covering periods of a year or more; (3) concertedly conditioning the licensing of one film or group of films upon the licensing of another film or group of films and by conditioning the licensing of films in one theatre or group of theatres upon the licensing of films in other theatres or group of theatres; (4) concertedly discriminating with respect to the license terms granted to theatres in large circuits because such theatres are part of a circuit. The means of such discrimination are said to be the licensing for exhibition in theatres of the five defendant exhibitors of runs ahead of those granted to competing independent exhibitors, and the continuance of these prior runs from season to season to the prejudice of independent exhibitors. As a result independent exhibitors are systematically excluded from the opportunity to procure preferred runs of pictures distributed by the defendants in the localities in which defendants' theatres operate and at times refused any run at all in order to protect defendants' theatres from competition.

It is further charged by the plaintiff that the distributor-exhibitor defendants have combined with each other: (1) by conditioning the licensing of film distributed by one defendant in theatres operated by another upon the licensing of films distributed by the latter in the theatres operated by the former; (2) by excluding independently produced films from affiliated theatres and by excluding unaffiliated exhibitors from competing with first run or other run theatres in cities and towns where affiliated theatres are located; (3) by excluding unaffiliated exhibitors from operating theatres on the same run as affiliated exhibitors; (4) by using the first and early runs of affiliated theatres to control the film supply, runs, clearances and admission prices of operators of competing unaffiliated theatres in cities and towns in which affiliated theatres are located; (5) by pooling or otherwise sharing with each other the profits of affiliated theatres owned or controlled by two or more exhibitor defendants located in the same competitive area and frequently by together operating on the same run in cases where they would be in competition with one another except for such pooling or profit sharing agreements; (6) by effecting a division of the territory of the entire United States among them for theatre operating purposes.

The amended and supplemental complaint prays: (1) That each of the contracts, combinations and conspiracies in restraint of trade, together with attemp's to monopolize the same, be declared illegal; (2) that the defendants and their subsidiaries be perpetually enjoined from continuing to carry out attempts at monopolization and all restraints of trade in distribution and exhibition of motion pictures; (3) that a nation-wide system of impartial arbitration tribunals, or such other means of enforcement as the court may deem proper, be established in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained in the decree; (4) that the five major defendants and their subsidiaries be directed to divest themselves of all interest and ownership, both direct and indirect, in any theatres which the court shall find to have been used by one or more of them unreasonably to restrain trade and commerce in motion pictures.

After the amended and supplemental complaint was filed, the plaintiff and the five major defendants and their subsidiary corporations that were parties to the suit, executed a written consent to the entry of a decree by the District Court, signed November 20, 1940. A decree was made in accordance with the consent reciting that no testimony had been taken, that no provision of the decree should be construed as an admission or adjudication that any of the plaintiff's charges were true, or that the consenting defendants had violated any law, or that the doing or the failure to do any of the acts or things enjoined or directed to be done would constitute a violation of law.

The decree enjoined the consenting defendants as follows:

(1) No distributor defendant shall license feature motion pictures for public exhibition within the United States at which an admission fee is to be charged until the feature has been trade shown within the exchange district in which the exhibition is to be held.

(2) No distributor defendant shall offer for license or shall license more than five features in a single group. The license of one group of features shall not be conditioned upon the licensing of another feature or group of features, nor shall any distributor defendant require an exhibitor to license shorts, reissues, westerns, or foreigns as a condition of licensing other features. Disputes as to violation of these provisions shall be subject to arbitration. The power of the arbitrator shall be limited to a determination of whether the offer to license or the license was conditioned and, if found to be conditioned, to imposing a penalty against the distributor of not to exceed $500.

(3) No license for features to be exhibited in theatres located in one exchange district shall include theatres located in another exchange district.

(4) No distributor defendant shall refuse to license its pictures for exhibition in an exhibitor's theatre on some run to be designated by the distributor upon terms and conditions fixed by the distributor, if the exhibitor can satisfy reasonable minimum standards of theatre operation

and is reputable and responsible, unless the granting of a run on any terms will have the effect of reducing the distributor's total film revenue in the competitive area in which such exhibitor's theatre is located. Controversies arising from a complaint by an exhibitor for violation of the foregoing provision shall be subject to arbitration under which an award based on a finding of violation shall direct the distributor to offer its pictures to the complainant on a run to be designated by the distributor, and upon terms fixed by the distributor, which are not calculated to defeat the purposes of this subdivision.

(5) Controversies arising from the complaint of an exhibitor that a feature licensed by a distributor defendant for exhibition in a particular theatre is generally offensive in the locality on moral, religious, or racial grounds shall be subject to arbitration, and, if the feature shall be found to be thus offensive, an award shall be made cancelling the license in so far as it relates to the exhibition of the feature in that theatre.

(6) Controversies arising upon the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable shall be subject to arbitration. Reasonable clearance as to time and area was stipulated and held by the consent decree to be essential to the distribution and exhibition of motion pictures. In determining whether a clearance complained of is unreasonable the arbitrator should consider the historical development of clearance in the area, the admission price of the theatres involved; their character, location, and type of entertainment; the rental terms and license fees paid by them; the extent to which they compete for patronage, and all other business considerations except affiliation of the theatres with a distributor or with a circuit of theatres. If the clearance be found unreasonable, the award shall fix the maximum clearance between the theatres involved, which may be granted in licenses thereafter entered into by a distributor that is party to the arbitration. The award may also fix, subject to the provisions of Section XVII of the consent decree, such maximum clearance under any existing franchise, i.e., a licensing

agreement, or a series of licensing agreements, covering more than one motion picture season and covering the exhibition of pictures released by the distributor during the entire period of the agreement. Nothing contained in this subdivision, nor any award in arbitration, shall restrict the exhibitor's right to license for any theatre any run which it is able to negotiate, nor shall restrict the distributor's right to license any run which it desires to grant, nor to license the exhibition of any special feature under a contract the terms of which, including provisions for clearance, are applicable only thereto.

(7) Controversies arising upon a complaint by an independent exhibitor that a distributor defendant has arbitrarily refused to license its features for exhibition on the run requested by the exhibitor in one of the latter's theatres shall be subject to arbitration, but the making of any award is to be subject to certain specified conditions and no award made shall affect the license to exhibit any features then under license, but only future licenses.

(8) For three years after the entry of the decree, the consenting defendants are to notify the Department of Justice of any legally binding commitment for the acquisition of any theatre or theatres. During such period, each defendant is to report monthly the changes in its theatre position together with a statement for the reason of such changes. For three years following the entry of the decree, no consenting defendant shall enter upon a general program of expanding its theatre holdings. Nothing shall prevent any such defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purposes of its business.

(9) The decree shall not be construed to limit, impair or alter the right of a distributor to license the exhibition of motion pictures, subject to such terms as may be satisfactory to it, (a) in any theatre in which, or in the proceeds of which, it is directly or indirectly interested; (b) in any theatre an interest in which of not less than 50% is acquired after the date of the decree and which it owns at the time of such license, and (c) in any theatre of which a company in

which the defendant owned not less than 42% of the common stock at the date of the decree and at the time of such license acquires after the date of the decree and owns at the time of such license a financial interest of not less than 50%.

(10) Except as otherwise expressly and specifically provided in the decree, nothing therein shall be construed to limit the right of any distributor to select its own customers, bargain with them in accordance with law, or negotiate with or license to or accept any offer from any exhibitor to license its motion pictures or any number thereof, upon such terms and conditions as it deems advisable or to its best interests.

(11) For a period of three years after the entry of the consent decree the plaintiff shall not seek either in this or any other action against the consenting defendants to divorce the production or distribution of motion pictures from their exhibition or to dissolve any defendant or any corporation in which it has directly or indirectly a substantial stock interest and which is engaged in the exhibition of motion pictures, or holds directly or indirectly a substantial stock interest in any corporation so engaged, or to dissolve or break up any circuit of theatres of any such defendant or of any such corporation, or to require any such defendant, corporation or circuit to divest itself of its interests or any thereof in motion picture theatres in which it had an interest at the time of the entry of the decree.

(12) The method and conditions of and the procedure for the arbitration of controversies and the powers of an appeal board created by the court to entertain appeals from the arbitration tribunal are set forth in the decree.

(13) Jurisdiction is retained by the decree for the purpose of enabling any parties to apply to the court at any time more than three years after the date of the entry for any modification thereof.

The three minor defendants and their subsidiaries did not consent to the decree of November 20, 1940, presumably because of their opposition to the provisions requiring trade-showing and prohibiting block-booking of groups of more than five films. It was provided that if the plaintiff

did not secure the entry of a decree against the three minor defendants before June 1, 1942, the consenting defendants were to be released from those provisions. Such a decree was in fact not entered by the specified date, and accordingly the sections of the decree regarding trade-showing and block-booking have lapsed. Nevertheless, according to the testimony, the consenting defendants have continued to comply with them.[1]

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[1] The following are definitions of terms used in this opinion:

Block-booking—The practice of licensing, or offering for license, one feature, or group of features, upon condition that the exhibitor shall also license another feature or group of features released by the distributor during a given period.

Clearance—The period of time, usually stipulated in license contracts, which must elapse between runs of the same picture within a particular area or in specified theatres

Exchange District—An area in which an office is maintained by a distributor for the purpose of soliciting license agreements for the exhibition of its pictures in theatres situated throughout the territory served by the exchange and for the physical distribution of such films throughout this territory.

Feature—Any motion picture, regardless of topic, the length of the film of which is in excess of 4000 feet.

Formula Deal—A licensing agreement with a circuit of theatres in which the rental price of a given film is measured for the circuit as a whole by a specified percentage of the picture's national gross.

Franchise—A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of the agreement.

Independent—A producer, distributor, or exhibitor, as the context requires, which is not a defendant in this action or a subsidiary or affiliate of a defendant.

Master Agreement—A licensing agreement also known as a "blanket deal", covering the exhibition of films in a number of theatres, usually comprising a circuit.

Motion Picture Season—A one-year period beginning about September 1 of each year.

Road-show—A public exhibition of a motion picture in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in the areas where they are located.

Runs—The successive exhibitions of a motion picture in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on.

Trade-showing—A private exhibition of a film prior to its release for public exhibition, as required by Section III of the consent decree.

Counsel for the five major defendants and their subsidiaries contend that the consent decree has, in some respects at least, the effect of a final judgment which may not be modified. But we cannot see how such a position is consistent with the language of Section XXIII (d), which permits "* * * any of the parties to this decree to apply to the Court at any time more than three years after the date of the entry of the decree for any modification thereof." That period has expired, and therefore everything relating to rights under and remedies for violation of the Sherman Act is, therefore, open for consideration, even as between consenting parties: and certainly nothing has hitherto been decided which affected the non-consenting parties. It would seem to follow that we cannot bind any parties to subject themselves to the arbitration system or the board of appeals set up in aid of it without their consent, even though we may regard it as desirable that such a system, in view of its demonstrated usefulness, should be continued in aid of the decree which we propose to direct.

The evidence has established various infractions of the Sherman Act on the part of each of the defendants which we shall proceed to discuss.

Price-fixing

The defendants who have granted moving picture licenses have fixed minimum admission prices which the exhibitor agrees to charge irrespective of whether it is to pay a flat rental or a percentage of the theatre receipts. It is said that these minimum admission prices are in general only those currently charged by the exhibitors and that they are placed in the licenses in order to assure the distributor of a minimum revenue when it licenses upon a percentage basis, and also to assure a continuation of the conditions which moved it to grant a given run to the exhibitor.[2]

[2] That the distributor-defendants have more than merely a passive interest, as they claim, in the maintenance of specified minimum prices is shown by their inclusion in the licenses of provisions for severe penalties if less than those prices are charged. Some licenses provide that if the schedule of minimum prices is violated, all existing licenses

Whatever the reason, the various licensing defendants have agreed with their licensees to a system which determines minimum admission prices in all theatres where motion pictures licensed by them are exhibited. In this way are controlled the prices to be charged for most of the motion pictures exhibited either by the defendants, or by independents, within the United States. That the eight defendants distribute most of the features is evident from the record. For example, during the 1943-44 season the eight defendants distributed about 77.6% of all features nationally distributed except "westerns" and low cost productions, and even if the latter inferior and non-competitive pictures are included, they distributed 65.5%. See Plaintiff's Exh. 426; Record p. 2400. The control of distribution closely resembles that appearing in *Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. 2d 738, 744-5 (C. C. A. 3), where the court said:

> "Defendants control the production and distribution of more than 80% of feature pictures in this country, and no exhibitor can successfully operate without access to defendants' product."[3]

The licenses are in effect price-fixing arrangements among all the distributor-defendants, as well as between such defendants individually and their various exhibitors. Such combinations we hold to be forbidden by the Sherman Act.

The exhibits submitted in this case contain numerous express agreements between the various distributing defendants and their licensees stating the minimum admission prices which licensees are required to maintain in showing the distributors' pictures in the areas concerned. The agreements are not only between the distributor-defendants

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of the distributor for that theatre may be cancelled at the option of the distributor; other licenses provide that the particular license may be cancelled or that the exhibitor's clearance over subsequent runs be greatly reduced. See Plaintiff's Exhibits 275-290.

[3] The defendants in the *Goldman* case were substantially the same as those here, except that Universal Corporation was there eliminated by agreement.

and other defendants owning theatres, but also between the distributor-defendants and independent theatre owners. A correlation of these agreements shows that in many instances the minimum prices set forth in the license agreements by the various defendants are in substantial conformity. Indeed, it is conceded in the joint brief filed on behalf of Loew's, Paramount, Warner, RKO and Twentieth Century-Fox that the admission prices included in licenses of the various distributor-defendants are in general uniform, being the usual admission prices currently charged by the exhibitors. At pages 31-2 of the joint brief it is stated:

> "The testimony shows that it is the general practice of all the distributors, whether dealing with independent exhibitors or affiliated ones, to include a provision in the license agreement that the exhibitor shall not charge less than a specified minimum admission price during the exhibition of the particular picture or pictures licensed. * * * The minimum admission price included in the license is not one which the distributor dictates, but is the usual admission price currently charged by the exhibitor. (R. 433, 718, 968, 999, 1382-3.) It is the practice of exhibitors to charge the same scale of admission prices over a period of time and not to change them according to whose pictures are being exhibited or according to any fluctuations in the type of picture."

A similar statement is made at page 18 of the brief of Columbia, and the brief of United Artists and Universal appears to argue on the same assumption at pages 24-39.

It does not seem important whether the distributor was the more controlling factor in determining the minimum admission prices. Whether it was such a factor or merely acceded to the customary prices of the exhibitors, in either event there was a general arrangement of fixing prices in which both distributors and exhibitors were involved. But it is plain that the distributor did more than accede to exist-

ing price schedules.[4] The licenses required them to be maintained under severe penalties for infraction, and the evidence shows that the distributors in the case of exceptional features, where not satisfied with current prices, would refuse to grant licenses unless the prices were raised.[5] More-

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[4] Regan, vice-president in charge of distribution and sales for Paramount, testified as follows:

"Q. Well, does that (the admission price) fix his right to a particular run or to clearance? A. It would have an influence upon the run and clearance, yes, sir."

. . . . . .

"Q. Why would you be interested in the minimum admission price or the admission price charged by the exhibitor in connection with determining what run you would negotiate for? A. Because the admission price that he charges determines the film rental that I can earn for my pictures." Record pp. 718-9.

See also testimony of Kupper in charge of distribution organization of RKO. Record p. 1084.

[5] Testimony of John J. Friedl, president of Minnesota Amusement Company—the stock of which is owned by Paramount, was as follows:

"Q. Are there occasional instances of special attractions where there is a negotiation as to a higher admission price with the distributor? A. That has come up on several occasions. In the case of the picture 'Woodrow Wilson', and several other pictures, they have been released by the distributors as road show attractions, and in those cases the distributors insisted upon road show prices, and it was the option of the purchaser, or the theatre, to buy or not to buy those pictures at those prices; but if he expected to play the picture at that time, he would have to charge such admission price.

"Q. And if he was not willing to advance his admission price to meet the distributor's terms, he had the opportunity to play this picture on regular run, is that right? A. At a later date, that is correct.

"Q. Is the provision for that minimum admission price included not only in license contracts for first-run exhibition but also for subsequent-run exhibition? A. Yes, I think it applies in all cases.

"Q. Is it included in license contracts for percentage pictures and also for flat rental pictures? A. Yes, sir.

"Q. Where the admission price is included for subsequent-run exhibition, does your answer with respect to who determines the admission price apply to that as well? A. That is correct. But, of course, it is reasonable to assume, to understand, that in setting our admission prices, we do not do that on an arbitrary basis because it is reasonable to expect that the larger theatres playing the first-runs would get the maximum price for the protection of the dis-

over, the distributors, when licensing on a percentage basis, were interested in the prices charged and even when licensing for a flat rental were interested in admission prices to be charged for subsequent runs which they might license on a percentage basis. Likewise all of the five major defendants had a definite interest in keeping up prices in any given territory in which they owned theatres, and this interest they were safeguarding by fixing minimum prices in their licenses when distributing their films to indpendent exhibitors in those areas. Even if the licenses were at a flat rate, a failure to require their licensees to maintain fixed prices would leave them free by lowering the current charge to decrease through competition the income in the licensors' own theatres in the neighborhood. The whole system presupposed a fixing of prices by all parties concerned in all competitive areas.

The similarity of specified minimum prices prescribed for the same theatres in the distributor-defendants' contracts of license is shown by the following table collated from exhibits in evidence.[8] The exhibits used to prepare the table contained answers of the defendants to plaintiff's interrogatories about the first block of five features licensed for the 1943-44 season by each of the five major distributor-defendants, and about the first five pictures licensed by each of the three minor defendants, and about that picture of each defendant which during the season received the most billings in the United States.

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tributor and the producer. And in the secondary houses the prices are less.

"Q. That is, generally speaking, the first-run houses charge a higher price than subsequent-run, and then the prices step down among the runs? A. That is correct." Record p. 1000.

[8] This table is derived from Plaintiff's Exhibits 41, 42, 57 (1-49), 82, 94, 126, 127, 128, 139, 365, 369. In most of the exhibits there was an indication as to whether the admission price given included or excluded taxes. When this information was given in the exhibits, it is stated in the table as "tax incl.", or "tax excl." The word "none" is used to mean that though a license was in evidence, no admission price was specifically stated in the contract, either through inadvertence or on the understanding that the admission prices currently being charged or contained in previous licenses would be continued. Record pp. 433, 724, 782, 1082, 1211. The symbol "x" is used to indicate that no license of that distributor for that particular theatre was in evidence.

Theatre	City, State	Paramount	Loew's	Warner	RKO	Fox	Col.	U. A.	Univ.
Sneicer	Akron, Ohio	30¢ tax excl.	27¢	30¢	30¢	x	x	30¢	x
Bailey	Buffalo, N. Y.	30¢	x	30¢	none	27¢	29¢	none	x
Liberty	Covington, Ky.	28¢ tax excl.	x	33¢ tax incl.	none	x	x	x	x
Madison	Covington, Ky.	28¢ tax excl.	28¢	x	none	28¢	x	x	x
LaSalle	Niagara Falls	30¢ tax incl.	27¢	x	none	27¢	x	x	x
Paramount	Akron, Ohio	30¢ tax excl.	22¢	25¢	none	20¢	x	25¢	x
Capitol	Cleveland, Ohio	30¢ tax	27¢	30¢	x	30¢	x	x	x
Shaker	Cleveland, Ohio	35¢ tax excl.	x	35¢	x	35¢	x	35¢	x
Heights	Cleveland, Ohio	30¢ tax excl.	27¢ tax incl.	30¢	none	30¢	x	x	x
Senate	Detroit, Mich.	x	37¢	35¢	none	35¢	x	none	x
Rits	Baltimore, Md.	x	25¢	28¢ tax incl.	none	25¢	x	none	25¢
Vilma	Baltimore, Md.	x	25¢	28¢	none	25¢	x	none	x
Centre	Baltimore, Md.	x	30¢	33¢ tax incl.	x	30¢	x	x	30¢
Hampden	Baltimore, Md.	x	x	x	x	27¢	x	27¢	25¢
Columbia	Baltimore, Md.	x	25¢	28¢	none	25¢	x	x	25¢
Broadway	Baltimore, Md.	x	27¢	x	x	27¢	x	27¢	25¢
Apollo	Baltimore, Md.	x	25¢	x	x	27¢	x	25¢	25¢
Irvington	Baltimore, Md.	x	x	28¢	25¢	25¢	x	x	25¢
Montevista	Cincinnati, Ohio	30¢	30¢	x	33¢	x	x	30¢	x
20th Century	Cincinnati, Ohio	29¢ tax excl.	30¢	x	30¢	x	x	30¢	x
Jackson	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Esquire	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Sunset	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Westwood	Cincinnati, Ohio	29¢ tax excl.	x	x	x.	x	x	30¢	x
Lawrence	New Haven, Conn.	27¢	27¢	33¢	27¢	27¢	x	25¢	x
Westville	New Haven, Conn.	[redacted]	30¢	33¢	none	30¢	x	30¢	x
Pequot	New Haven, Conn.	[redacted]	30¢	33¢	30¢	x	x	33¢	x
Whalley	New Haven, Conn.	[redacted]	30¢	33¢	none	30¢	x	30¢	x
Hamilton	Indianapolis, Ind.	35¢	x	35¢	35¢	45¢	x	x	x
Sunshine	Albuquerque, N. M.	none	40¢	x	42¢	40¢	30¢	x	x
Rio	Appelton, Wisc.	40¢	46¢	none	none	35¢ tax incl.	none	x	46¢ plus 0¢ tax
Rex	Beloit, Wisc.	36¢	27¢	40¢	35¢	36¢ tax incl.	35¢	x	42¢ plus 8¢ tax
Capitol	Charleston, W. Va.	x	40¢	x	40¢	x	x	x	x
Albee	Huntington, W. Va.	40¢	40¢	34¢	35¢	40¢	x	x	40¢
Reed	Alexandria, Va.	35¢	35¢	39¢ tax incl.	none	35¢	37¢	x	35¢
Rosna	Norfolk, Va.	27¢	27¢	x	x	x	x	x	x
Flynn	Burlington, Vt.	25¢	36¢	x	35¢	40¢	x	x	x
Gloria or Riviera	Charleston, S. C.	40¢	40¢	44¢	27¢	40¢	15¢	x	35¢
Stadium	Woonsocket,	40¢	40¢	x	none	x	x	x	x
Bijoux	R. I.	x	x	x	44¢	35¢	35¢	x	30¢

It is apparent from the foregoing that there was great similarity and in many cases identity in the minimum prices fixed for the same theatre in the licenses of all the defendants. Where there was a marked difference in price, as for example in the admissions specified by RKO, Columbia and Universal, in a theatre in Charleston, South Carolina, it is likely to have been due to the showing of a picture of a different class from the others, or upon a different run.

Such uniformity of action spells a deliberately unlawful system, the existence of which is not dispelled by the testimony of interested witnesses that one distributor does not know what another distributor is doing; and there can, in our opinion, be no reasonable inference that the defendants are not all planning to fix minimum prices to which their licensees must adhere. See Record p. 1322.

In addition, several of the exhibits disclose operating agreements between the five distributor-defendants who are also theatre owners, or between them and independent theatre owners in which joint operation of the theatres covered by the agreements is provided and minimum admission prices to be charged are either stated therein, or are to be jointly determined by other means. Apparently those particular price-fixing agreements do not involve the three minor defendants or their subsidiaries. For example, in Plaintiff's Exh. 220 there are agreements between subsidiaries of Loew's and Warner, covering the period of May 5, 1938 to August 31, 1947, according to which the admission prices for three theatres in Pittsburgh—two of Warner and one of Loew's—are to be fixed by a joint committee. In Plaintiff's Exh. 218, an agreement between Warner and Paramount provides that from March 1, 1936, to August 31, 1953, two theatres previously operated by Warner, and one theatre previously operated by Paramount in Hammond, Indiana, should be managed by Warner Bros. Circuit Management Corporation and the then present scale of admission prices maintained. By other agreements in Plaintiff's Exh. 219, RKO and Warner provided for joint operation from August 27, 1937, to August 31, 1950, of five theatres in Cleveland—three of RKO and two of Warner—for which minimum prices are to be determined by a joint operating committee. See also, *e. g.*, Plaintiff's Exh. 229 (Warner and

independent); Exh. 213 (Loew's and independents); Exh. 202 (RKO and independent); Exhs. 226, 226a (Paramount, Warner, and independent); Exh. 223 (Warner and independent); Exh. 386 (Paramount, RKO and independent); Exhs. 238, 239 (Fox and independents); Exh. 387 (Paramount, RKO and independent); Exh. 206 (RKO and Paramount); Exh. 221 (Warner and Paramount); Exh. 209 (RKO and Paramount); Exh. 205 (Paramount and independent). These agreements show the express intent of the major defendants to maintain prices at artificial levels.

As further evidence of a conspiracy among the distributors to fix prices, we find master agreements and franchises between various of the defendants in their capacities as distributors and various of the defendants in their capacities as exhibitors. These contracts stipulate minimum admission prices often for dozens of theatres owned by an exhibitor-defendant in a particular area of the United States. Loew's as distributor, for example, fixed minimum prices for nearly all of Paramount's 133 theatres in Florida in an agreement covering the 1943-44 season. Plaintiff's Exh. 57 (11). In the Chicago area Loew's again as distributor specified prices in a single agreement for upwards of 50 theatres owned by a Paramount subsidiary, Balaban & Katz Corporation. Plaintiff's Exhs. 250, 173. United Artists as distributor also specified prices for the Balaban & Katz theatres owned by a Paramount subsidiary, Balaban & Katz 369 (6). Similarly, Loew's specified prices for the entire Warner circuit of theatres for the 1943-44 season, Plaintiff's Exh. 57 (8-10, 21-2, 30, 32, 35, 38, 48); for the same season United Artists specified prices for five RKO theatres in Cincinnati, Plaintiff's Exh. 274; Paramount for seven RKO theatres in Cincinnati, Plaintiff's Exh. 240; Loew's for the same seven RKO theatres in Cincinnati, Plaintiff's Exh. 248; Warner for forty or more RKO theatres in Greater New York, Plaintiff's Exh. 126; Loew's for six Fox theatres in Los Angeles County, Plaintiff's Exh. 249; Warner for subsequent run Paramount theatres in Detroit and Birmingham, Michigan, Plaintiff's Exh. 244.

A master agreement between United Artists as distributor and Fox as exhibitor for the season 1938-39 covered distribution of pictures of five independent producers in Fox

theatre circuits in Los Angeles, San Francisco, Salt Lake City, St. Louis, Milwaukee, Omaha, Denver, and other cities, all on a percentage basis. It contained the following clause:

> "Where pictures are licensed on a percentage rental basis the scale of admission prices to be not less than the scale of admission prices charged to view pictures of comparable quality exhibited by the exhibitor and distributed by distributors other than United Artists."

The foregoing quotation shows an acquiescence of United Artists in admission prices fixed by any other distributor and an adherence to those prices in its own licenses. Plaintiff's Exh. 199.

A franchise agreement between Universal Corporation as distributor and Interstate Theatres, Inc., and Texas Consolidated Theatres, Inc., for the seasons 1941-44 is similar. Plaintiff's Exh. 261. In each of the two latter companies Paramount had a 50% interest. The franchise covered pictures distributed by Universal to the theatres of the two licensees and contained the ordinary provisions for penalties if minimum admission prices were not maintained. See note 2 *supra*. While no minimum prices were specified in the agreements it is not really questioned that in such circumstances the current prices were implied as part of the contract. See Record pp. 433, 724, 782, 1082, 1210-11.

There is also in evidence a franchise agreement between Columbia Pictures Corporation as distributor and Marcus Loew Booking Agency, a Loew's subsidiary, for the seasons 1944-46 covering pictures distributed to Loew's metropolitan New York Circuit. Plaintiff's Exh. 471. Minimum admission prices were not specified, but, as in other cases, were implied.

Licenses granted by one defendant to another for exhibition in only one theatre, while less striking evidence of conspiracy than the above master agreements and franchises, disclose the same inter-relationship among the defendants. Each of the five major defendants as a theatre-owning exhibitor has been licensed by the other seven defendants as distributors to exhibit the pictures of the latter at specified

minimum prices. RKO, for example, as a theatre-owner, has been granted licenses with price restrictions by the other defendant-distributors. In turn, RKO, being itself a distributor, has granted similar licenses to the other four exhibiting defendants. We think that RKO, Loew's, Warner, Paramount and Fox, in granting and accepting licenses with minimum prices specified, have among themselves engaged in a national system to fix prices, and that Columbia, Universal and United Artists, in requiring the maintenance of minimum prices in their licenses granted to these exhibitor-defendants, have participated in that system.

It is a reasonable inference from all the foregoing that the distributor-defendants have acquiesced in the establishment of a price-fixing system and have conspired with one another to maintain prices. Such a conspiracy is *per se* a violation of the Sherman Act. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *United States* v. *Masonite Corp.*, 316 U. S. 265.

Moreover, irrespective of the conspiracy among distributors to which we have referred, each distributor-defendant has illegally combined with its licensees, for in agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices. Each licensee knows from the general uniformity of admission price practices that other licensees having theatres suitable for exhibition of a distributor's picture in the particular competitive area will also be restricted as to maintenance of minimum prices, and this acquiescence of the exhibitors in the distributor's control of price competition renders the whole a conspiracy between each distributor and its licensees. An effective system of price control in which the distributor and its licensees knowingly take part by entering into price-restricting contracts is thereby created. That the combination is made up of a sum of separate

licensing contracts, individually executed, does not affect its illegality, for tacit participation in a general scheme to control prices is as violative of the Sherman Act as an explicit agreement. *Interstate Circuit* v. *United States*, 306 U. S. 208; *United States* v. *Masonite Corp.*, 316 U. S. 265; *Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. 2d 738 (C. C. A. 3).

This practice of stipulating minimum admission prices in the contracts of license is illegal in another respect. The differentials in price set by a distributor in licensing a particular picture in theatres exhibiting on different runs in the same competitive area are calculated to encourage as many patrons as possible to see the picture in the prior-run theatres where they will pay higher prices than in the subsequent runs. The reason for this is that if 10,000 people of a city's population are ultimately to see the picture—no matter on what run—the gross revenue to be realized from their patronage is increased relatively to the increase in numbers seeing it in the higher-priced prior-run theatres. In effect, the distributor, by the fixing of minimum prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible. This, we believe, to be in violation of § 2 of the Sherman Act, at least when the distributor's own theatres are not exhibiting its picture on a prior-run and it is to theatres other than its own that it attempts to give a monopoly.

It is argued that the practice of minimum admission price-fixing is permitted under the Copyrighted Act. But that act has never been held to sanction a conspiracy among licensors and licensees artificially to maintain prices. We do not question that the Coypright Act permits the owner of a copyrighted picture to exhibit it in its own theatres upon such terms as it sees fit, nor need we now decide whether a copyright owner may lawfully fix admission prices to be charged by a single independent exhibitor for the exhibition of its film, if other licensors and exhibitors are not in contemplation. *Interstate Circuit* v. *United States*, 306 U. S. 208; cf. *United States* v. *General Electric Co.*, 272 U. S. 476. As other licensors and exhibitors are always in contemplation, so far as we can see, the question would appear academic.

This does not contravene the rule announced in *United States* v. *General Electric Co.*, 272 U. S. 476, for there a license to only a single licensee—the Westinghouse Company—was involved, and, therefore, no conspiracy which sought to amplify the rights of the licensor under the Patent Act. The other question involved in that case was whether a patentee might lawfully require its bona fide agents to maintain minimum prices in selling the former's patented articles. The court held that it could. There is no claim here, however, that the exhibitors as licensees under the distributors' copyrights are agents in any sense, and we do not see that such a claim could be made. In any event, *United States* v. *Masonite Corp.*, 316 U. S. 265, involved facts closely analogous to those here and affords ample basis for our decision.

Some argument has been made that the defendants' fixing of minimum admission prices is exempted from operation of the Sherman Act by the Miller-Tydings Amendment to that act, 50 Stat. 693 (1937), 15 U. S. C. A. § 1 (1940). The amendment pertains, however, only to "contracts or agreements prescribing minimum prices for the resale of a commodity", and the undisputed evidence is that the distributors merely grant licenses to the exhibitors for exhibition of their films and that title to none of their films at any time passes to the exhibitors. Furthermore, the distributor-defendants have engaged in a conspiracy, and the amendment explicitly states that despite its other provisions, contracts or agreements between "persons firms, or corporations in competition with each other" to establish or maintain minimum prices remain illegal. *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707; *United States* v. *Univis Lens Co.*, 316 U. S. 241.

The foregoing holding that the defendants have all engaged in unlawful price-fixing does not prevent the distributors from continuing their present methods of determining film rentals; they may measure their compensation by stated sums, by a given percentage of a particular theatre's receipts, by a combination of these two, or by any other appropriate means. What is held to be violative of the Sherman Act is not the distributors' devices for measur-

ing rentals, but their fixing of minimum admission prices which automatically regulates the ability of one licensee to compete against another for the patron's dollar and tends to increase such prices as well as profits from exhibition.

If the exhibitors are not restrained by the distributors in the right to fix their own prices, there will be an opportunity for the exhibitors, whether they be affiliates or independents, to compete with one another. This is because one exhibitor by lowering admission prices will be able to compete with other exhibitors in obtaining patrons for his theatre—a competition which may well benefit both exhibitors and the public paying the admission fees.

Clearance and Run

Among provisions common to the licensing contracts of all the distributor defendants are those by which the licensor agrees not to exhibit or grant a license to exhibit a certain motion picture before a specified number of days after the last date of the exhibition therein licensed. This so-called period of "clearance" or "protection" is stated in the various licenses in differing ways: in terms of a given period between designated runs, as for example in the Chicago area, Plaintiff's Exh. 369, see *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C.C.A. 7), affirmed 326 U. S. (February 25, 1946), and as in Washington and New York, Plaintiff's Exhibits 244, 471; in terms of admission prices charged by competing theatres, as "20 days over 30¢ theatres, 28 days over 25¢ theatres," Plaintiff's Exhibits 57, 173, 178, 189; in terms of a given period of clearance over specifically named theatres, Plaintiff's Exhibits 94, 181, 242, 253, 259; in terms of so many days' clearance over specified areas or towns, Plaintiff's Exhibits 126, 175, 182, 182A, 183, 194, 244, 250, 255, 470, 476; in terms of clearances as fixed by other distributors, Plaintiff's Exhibits 188, 417; or in terms of combinations of these formulae.

It appears to be plaintiff's contention that clearance practices inherently operate to produce unreasonable restrictions of competition among theatres and are therefore *per se* violative of the Sherman Act. With this we do not

agree, for it seems to us that a grant of clearance, when not accompanied by a fixing of minimum prices or not unduly extended as to area or duration, affords a fair protection to the interests of the licensee without unreasonably interfering with the interests of the public. At common law a vendor of income-producing property may validly covenant with his purchaser not to compete for a given time or within a given area so long as the restrictions are reasonably necessary to protect the value of the property purchased. *Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co.* v. *Bay*, 200 U. S. 179; see *Rogers* v. *Parry*, 2 Cro. 326 (K. B. 1613); *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6). It is true that licenses of property rather than sales are here concerned and that the distributors covenant not only not to exhibit the films themselves, but also not to license them to others. Nevertheless, we believe these are not differences which affect the applicability of the common-law rule to the present case, for licenses between one distributor and one exhibitor with reasonable clearance provisions do not, in our opinion, involve anything unlawful. Such provisions are no more than safeguards against concurrent or subsequent licenses in the same area until the exhibitor whose theatre is involved has had a chance to exhibit the pictures licensed without invasion by a subsequent exhibitor at a lower price. It seems nothing more than an adoption of the common law rule to restrict subsequent exhibitions for a reasonable time within a reasonable area. While clearance may indirectly affect admission prices, it does not fix them and is, we believe, a reasonable restraint permitted by the Sherman Act. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Westway Theatre, Inc.* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830, affirmed on opinion below, 113 F. 2d 932 (C. C. A. 4); see *United States* v. *Masonite Corp.*, 316 U. S. 265; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436.

The costs of each black and white print is from $150 to $300, and of a technicolor print is from $600 to $800. Many of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high-priced theatres unless a system of successive runs with a reasonable

protection for the earlier runs is adopted in the way of clearance.

In Section VIII of the Consent Decree, moreover, there is the explicit statement to which all parties, including the plaintiff, consented

> "It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures."

While, as previously stated, we do not deem ourselves bound by any provision of the consent decree, if we now find that it violates the Sherman Act, the forcefulness of the phrasing of this sentence indicates the proved utility of clearance practices in the movie industry and also their apparent necessity for a reasonable conduct of the business. Indeed, it is practically conceded that exhibitors would find extremely perilous the acceptance of licenses for the exhibition of films without assurance by the distributor that a nearby competitor would not be licensed to show the same film either at the same time or so soon thereafter that the exhibitor's expected income—perhaps on the basis of which he agreed to the specified rental—would be greatly diminished. Moreover, we understand the plaintiff to concede that the licensor may license its pictures for different successive dates. A reasonable clearance is in practical effect much the same. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later-exhibiting theatre at lower than prior rates.

Several courts have previously considered the validity of clearances under the Sherman Act and have concluded that in the absence of an unconsciously long time or too extensive an area embraced by the clearance, or a conspiracy of distributors to fix clearances, there was nothing of itself illegal in their use. *Westway Theatre, Inc.* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830 (D. Md.), affirmed on opinion below, 113 F. 2d 932 (C. C. A. 4), and unreported cases therein cited; *Gary Theatre Co.* v. *Columbia Pictures Corp.*, 120 F. 2d 891 (C. C. A. 7). We find the reasoning of these cases persuasive.

It is true that in some instances large theatre circuits by use of their great film-buying power have been able to nego-

tiate successfully with the distributor-defendants for grants of unreasonable clearances or unjustified prior runs for their theatres. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C. C. A. 7), affirmed 326 U. S. (February 25, 1946); *Goldman* v. *Loew's*, 150 F. 2d 738 (C. C. A. 3); *United States* v. *Schine Chain Theatres, Inc.*, 63 F. Supp. 229 (W. D. N. Y.). While we cannot find sufficient evidence to support an inference that the major defendants here, though controlling some of the largest circuits of theatres in the country and thus possessing potential weapons of great strength, have either collectively or severally entered upon a general policy of discriminating against independents in their grants of clearances, yet they have acquiesced in and forwarded a uniform system of clearances and in numerous instances have maintained unreasonable clearances to the prejudice of independents and perhaps even of affiliates. The decision of such controversies as may arise over clearances should be left to local suits in the area concerned, or, even more appropriately, to litigation before an Arbitration Board composed of men versed in the complexities of this industry.

In determining the reasonableness of the specific clearances which may come before these tribunals, they should consider whether the clearance has been set so as to favor affiliates or control the admission prices of the theatres involved. A distributor will naturally tend to grant a subsequent run to and clearance over a theatre for which the owner of his own volition sets a low admission price, for the distributor will be inclined to seek out the higher priced theatres first where the revenue is likely to be greater and consequently in case of licenses on a percentage basis where a percentage share will be higher. This, however, would seem the inevitable result of the competition for the distributor's films from theatres which are the larger or better equipped, and for which higher admission prices may therefore be charged by their operators. Such competition the lower priced theatres must be prepared to meet; or else be content with subsequent runs and grants of clearance over them. The temptations to the distributor to use clearance grants to force a theatre to raise its prices and thus to

qualify for prior runs having less clearance over it, and more clearance over competitors are nevertheless obvious and the courts or arbitration board should guard that this is not done. Clearance should be granted on the basis of theatre conditions which the exhibitor creates, not the distributor. The line to be drawn is indeed indistinct, but its existence is no less real.

In determining whether any clearance complained of is unreasonable, the following factors should be taken into consideration and accorded the importance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The admission prices, as set by the exhibitors, of the theatres involved;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, giveaways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

The foregoing has been directed to the validity of clearance provisions resulting from separate negotiations between individual distributors and exhibitors in free and open competition with other distributors and exhibitors, and, as stated, we believe their reasonable use to be lawful. It is here claimed by plaintiff, however, that the dis-

tributor-defendants have acted in concert in the formation of a uniform system of clearances for the theatres to which they license their films and that the exhibitor-defendants have assisted in creating and have acquiesced in this system. This we find to be the case and hold to be in violation of the Sherman Act.

The following testimony warrants the inference that the defendants, as we found to be the case in the fixing of admission prices, have acted in concert in their grants of run and clearance. William F. Rodgers, general sales manager and vice-president of Loew's, testified that the field managers determine whether a theatre shall be licensed to exhibit on a first or on a subsequent run, that the clearance of a given theatre is more or less historical, except for that of new theatres, and that there has been very little change in clearance over a period of years. Record pp. 542-3. Prior to 1943-44 Loew's license agreements provided that the clearance granted therein should apply to any theatre thereafter opened. Record p. 556.

Charles M. Reagan, vice-president of Paramount in charge of sales, stated that once clearance is agreed upon, it remains the same unless either exhibitor or distributor wants to change it. Record pp. 710-11. There is a difference between a distributor's and an exhibitor's interest in the period of clearance granted. The distributor wants to get the most possible in film rental from all the runs, the exhibitor to get as much clearance over a succeeding run as possible, because he has no interest in any succeeding run. The distributor, however, has a definite interest. Record p. 710. Clearances as granted apply to all pictures regardless of their quality. Record p. 715.

Martin J. Mullen, vice-president of M & P Theatres, a managing corporation which operates a group of New England theatres affiliated with Paramount, said that clearance is generally negotiated each time a license contract is made, but is actually carried along from year to year and generally understood when once established; that originally, before this time, clearance was established as a result of individual negotiations and followed along the same lines as they were with some changes. Record p. 968. All

defendants grant the same clearance to the same theatre. Record p. 977.

John J. Friedl, president and general manager of the Minnesota Amusement Company, a wholly-owned subsidiary of Paramount, said that he generally got from the various distributors the same clearance for the particular theatre for which he is negotiating; that while clearance is negotiated with each license, it generally remains the same, and the same clearance is granted by distributor-defendants and non-defendants alike, Record p. 1003; that clearance is pretty well established, and it is definitely followed in all cases. Record p. 1013.

Morton J. Thalheimer, an independent theatre exhibitor in Richmond, Virginia, called as a witness by Fox, testified that clearance was in effect in Richmond when he first went into business, and it seemed perfectly normal and natural that it should remain that way; that it protects his first-run against his own sub-runs and against his competitor's sub-runs. Record p. 1384. To his knowledge, the system of clearances had existed in Richmond for over nineteen years, during which time there had not been any change. Record p. 1401.

Harold J. Fitzgerald, president of Fox Wisconsin Theatres, Inc., operating sixty-six motion picture theatres in Wisconsin and Michigan, a wholly owned subsidiary of the defendant National Theatres Corporation, testified by affidavit that the situation with respect to the licensing of films, and the runs and clearances involved, were much the same in 1928 as they are today, Record p. 1973; that licensing arrangements were vital to distributor and exhibitor and that clearance obviously had a definite effect upon the capacity of his corporation to secure patronage at its top admission price. If Fox Wisconsin undertook to pay a distributor the film rental based upon a high percentage of gross, it would be interested in clearance over any neighborhood theatre which the distributor might license on a competing subsequent run. Generally negotiations as to clearance do not take place with respect to each block of pictures licensed because once a fair and reasonable clearance has been determined by the distributor and exhibitor it tends to become fixed, and ordinarily will be the same in a series of contracts

in the absence of any unchanged circumstances and conditions. Record p. 1983.

Benjamin Kalmenson, sales manager of Warner Bros. Distributors Corporation, testified that clearances have been pretty well set through the country for a great many years, and are "acquiesced in by exhibitors, producers, independents, affiliates and everybody, until there has grown up a kind of system of clearance." Record p. 1506.

Robert Mochrie, general sales manager of RKO Radio Pictures, Inc., stated upon his examination that RKO in determining the length of clearance between theatres, takes into consideration the amount of clearance which in its opinion will yield it the largest revenue, taking all theatres into account as a whole and subject to a clearance condition that has built itself up in the city over a period of time. In negotiating licenses, there is frequent occasion to give consideration to the existing clearance between theatres, but they do not consider it anew each time because the factors which determined it originally at some past time remain stable from year to year. He said there are no general or frequent instances in his practice of clearances different in some particular city, from those granted by a co-defendant. He usually knows what clearances other distributors are granting. His customer usually tells him what clearance he wants, which is what he is getting from other distributors. He has no agreements with other distributors that he will adopt the same clearance, and his explanation as to why in some instances the clearances granted by RKO to a prior run theatre is the same as a clearance granted by one or more other distributors serving the same theatre is that clearance has been the outgrowth in time between those two theatres, and the exhibitor buys such products on such a clearance basis and offers the witness the same. Record pp.1714-15.

Abraham Montague, general sales manager of Columbia, testified that in negotiating deals, the "clearance is something we usually find when we arrive there, and we usually negotiate our deal within the clearance we find"; that it would be impracticable and impossible to set up new clearance. Record p. 1268. His company keeps a record of clearances in the community. Record p. 1347. Where his com-

pany grants clearance to one theatre over another, it usually follows the pattern set by clearance that is given by other major distributors as well as those which are not majors. He usually does not make any independent determination of whether the clearance is reasonable or unreasonable. He takes it as he finds it, and finding it in most cases standardized, his company does not feel that it is strong enough to change it. Record pp. 1376-7.

Paul N. Lazarus, manager of the contract department of United Artists, testified that clearances are "generally understood, and they follow along their established custom." Record p. 1440. For testimony of other witnesses to the same effect as the foregoing, see Record pp. 2012, 2043, 2049, 2086, 2110-11.

The fixed character of clearances and the uniformity of the distributor-defendants' practice with reference thereto are shown by the exhibits, as well as the testimony. Many of the franchises, master agreements, and so-called "formula deals" which are in evidence provide that clearances shall be the same as those in effect on the date of the agreement. See Plaintiff's Exhibits 419A (RKO and independent); 419B (RKO and Paramount); 241 (Paramount and Fox); 172 (Paramount and Loew's); 473 (RKO and Universal); 245 (Warner and Fox); 251 (Fox and Paramount); 254 (Fox and RKO). Some of the agreements establish clearances for more than a season. See Plaintiff's Exhibits 181 (3 years, Loew's and Warner); 187 (3 years, Loew's and Fox); 249 (9 years, Loew's and Fox); 259 (3 years, Warner and Universal). Others provide that the clearance is to be no less favorable to the exhibitor than that which had been granted by the distributor for the previous season or in the preceding agreement. See Plaintiff's Exhibits 265, 472 (Columbia and Fox); 190 (RKO and Fox); 199, 272A, 383 (United Artists and Fox).

In some of the agreements, the clearance therein stated was also to be granted to all theatres which the exhibitor-party to the contract might thereafter own, lease, control, manage, or operate. See Plaintiff's Exhibits 172 (Paramount and Loew's); 266, 266A (Columbia and Warner); 471 (Columbia and Loew's); 192 (Fox and Warner). Moreover, the license forms for 1936-7 of Paramount, Fox,

Loew's, Warner, RKO, Columbia and Universal, and for 1943-44 of Paramount, Warner, Columbia and Universal, each contain a provision identical or similar to the following:

> "If clearance is granted against a named theatre or theatres indicating that it is the intention of the Distributor to grant such clearance against all theatres in the immediate vicinity of the Exhibitor's theatres then unless otherwise provided in the schedule, such clearance shall include any theatre in such vicinity thereafter erected or opened." See Plaintiff's Exhibits 275, 277, 279-81, 283-6, 289-90.

It is clear that the purpose of these two types of clearance agreements was to fix the run and clearance status of any theatre thereafter opened, not on the basis of its appointments, size, location, and other competitive factors normally entering into such a determination, but rather upon the sole basis of whether it were operated by the exhibitor-party to the agreement.

Much that has been said about clearances is applicable also to runs; the two are practically alike. Clearances are given to protect a particular run against a subsequent run, and the practice of clearance is so closely allied with that of run as to make comment on the one applicable to the other.

Rodgers, of Loew's testified that a run usually remains static for a given theatre, Record p. 421, and he determines what runs shall be "offered" to an exhibitor. Record p. 418. The size of the theatre does not necessarily determine whether it is satisfactory for operation on a first run. Record p. 566.

Reagan, of Paramount, said that negotiations with an exhibitor are "usually conducted on the basis of a particular run." In the case of a new theatre, the distributor usually considers whether it wants to do business on the run the theatre would like.[7] In the New York area, second runs are

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[7] "Q. And some negotiations are conducted on the basis of a first-run of a product, some second, some subsequent? A. Yes, sir.

Judge Bright: You mean the particular run is established before the negotiation with the exhibitor?

sold by him only to Loew's and RKO. Record pp. 815-16.

The evidence we have referred to shows that both independent distributors and exhibitors when attempting to bargain with the defendants have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatres or with theatres to which the latter have licensed their pictures. Under the circumstances disclosed in the record there has been no fair chance for either the present or any future licensees to change a situation sanctioned by such effective control and general acquiescence as have obtained. See *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C.C.A. 7), affirmed 326 U. S. — (February 25, 1946); *Goldman* v. *Loew's, Inc.*, 150 F. 2d 738 (C.C.A. 3); *Youngclaus* v. *Omaha Film Board of Trade*, 60 F. 2d 538 (D.C. Neb.). The only way competition may be introduced into the present system of fixed prices, clearances, and runs is to require a defendant when licensing its pictures to other exhibitors to make each picture available at a minimum fixed or percentage rental and (if clearance is desired) to grant a reasonable clearance and run. When so offered, the licensor shall grant the license for the desired run to the highest bidder if such bidder is responsible and has a theatre of a size, location, and equipment to present the picture to advantage. In other words, if two theatres are bidding and are fairly comparable the

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The Witness: Sometimes it generally is established, although that has been the result of years of experience that we have had in negotiating with our customers.

Judge Bright: How about a new theatre or new exhibitor?

The Witness: There is nothing established there, and we consider all the factors there and make a decision on whether we want to do business with him on the run that we would like to have.

Q. Now, how is the matter of terms upon which Paramount films will be licensed, determined? A. Determined by negotiations based upon experience we have had with the particular theatre with whom we are negotiating." Record p. 693.

"Q. You do not mean that each time there is a negotiation the whole question of run is opened up again? A. No, it is not.

Q. The policy on which the theatre is operated has usually been established over a long period of time? A. Yes."

one offering the best terms shall receive the license. Thus price fixing among the licensors or between a licensor and its licensees as well as the non-competitive clearance system may be terminated, and the requirements of the Sherman Act, which the present system violates, will be adequately met. The administrative details involved in such changes will require further consideration. We are satisfied that existing arrangements are in derogation of the rights of independent distributors, exhibitors, and the public, and that the proposed changes will tend to benefit them all.

Formula Deals, Master Agreements, and Franchises

Formula deals, certain master agreements, and franchises have tendered to restrain trade in the distribution and exhibition of motion picture features and in view of the history and relation to the moving picture business of the various parties to this action have exercised unreasonable restraints. In our opinion these restraints will be obviated or at least sufficiently mitigated by requiring a distributor wishing its pictures to be shown outside of its own theatres to offer to license each picture to all theatres desiring to show it on a particular run and, if the theatres are responsibly owned and otherwise adequate, to grant the desired run to the highest bidder.

Formula deals have been entered into by Paramount and by RKO with independent and affiliated circuits. By such agreements a particular circuit has been licensed to exhibit a certain feature in all its theatres at a specified percentage of the national gross receipts realized from that feature by all theatres in the United States. The circuit may allocate playing time and film rentals among the various theatres as it sees fit. See Plaintiff's Exhibits 241, 419A, 419B. Arrangements whereby all the theatres of a circuit are included in a single agreement, and no opportunity is afforded for other theatre owners to bid for the picture in their several areas, seriously and as we hold unreasonably restrain competition. These formula deals have been negotiated without, so far as we are informed, any competition on the part of independent theatre owners who would labor under a great disadvantage in attempting severally to

match or outbid the offers of a circuit that was making offers for all of its theatres.

Certain master agreements are open to the same objection as formula deals, for they cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and also to exhibit the features upon such playing time as it deems best, and leaves other terms to the circuit's discretion. See, *e.g.*, Plaintiff's Exhibits 196, 251, 267, 270, 270A, 273, 476. These are different from some other master agreements in which there are separate provisions covering the licensing of the picture for each particular theatre. See, *e.g.*, Plaintiff's Exhibits 182, 182A, 189, 190, 191, 248. These later agreements in effect only combine in one document a number of theatres with proper licenses for each. This may be done if there is an opportunity for exhibitors to bid for the same runs at an offered price.

Franchises which so far as the five major defendants are concerned were forbidden by the consent decree are also objectionable because they cover too long periods (more than one season) and also because they embrace all the pictures released by a given distributor. They necessarily contravene the plan of licensing each picture, theatre by theatre, to the highest bidder.

It is true that a prohibition of formula deals, master agreements and franchises will interfere with certain contracts which have been made in the past but their formation was a restraint upon trade which was unlawful at the time they were made, and therefore should not be continued. We see no reason to hold that the failure to bring in to this suit one of the contracting parties prevents the issue of an injunction forbidding one who is a party to the suit from continuing to cary out an arrangement which causes unlawful restraints. While our decision will not be res judicata as to those not parties to the litigation, the parties are necessarily and properly bound, and indeed the decision is a judicial precedent against the others on the questions of law involved in those situations we have referred to where they have unreasonably restrained trade and commerce.

In our opinion it follows from the foregoing that provisions in license agreements known as moveovers which

give to a licensee the privilege of exhibiting a given picture in a second theatre as a continuation of a run in a first theatre are incompatible with the system we have prescribed of bidding for pictures and runs theatre by theatre. The same would seem to be true of so-called overage-and-underage provisions which are often inserted in licenses to permit an exhibitor owning a number of theatres to apply a deficit in the playing time in one or more others. Under such provisions it is not possible to determine the amount payable for the account of one theatre until the performances in the others have been completed, or practically to apply the bidding system we are establishing. But provisions in licenses for "extended" or "repeat" runs in the same theatre, though apparently criticized by the government, would not seem to be objectionable if reasonably limited in time when other exhibitors are given the opportunity to bid for similar licenses. Likewise, any other license provisions which may be called to our attention that would substantially interfere with the effectiveness of the bidding system would have to be revised and perhaps may have to be specially dealt with in the decree to follow this opinion.

Block-booking and Blind-selling

For many years the distributor-defendants licensed their films in "blocks," or indivisible groups, before they had been actually produced. In such cases the only knowledge prospective exhibitors had of the films which they had contracted for was from a description of each picture by title, plot and players. In many cases licenses for all the films had to be accepted in order to obtain any, though sometimes the exhibitor was given a right of subsequent cancellation for a certain number of pictures. Because of complaints of block-booking and blind-selling based upon the supposed unfairness of contracts which often included pictures—the inferior quality of which could not be known—Sections III and IV of the consent decree required the five consenting distributors to trade-show their films before offering them for license and limited the number which might be included in any contract to five. More than one block of five however could be licensed where the contents of any had been trade-

shown. While this restriction in the consent decree has now ceased by time limitation, the consent distributors have continued to observe the restriction. The non-assenting distributors have retained up to the present time their previous methods of licensing in blocks, but have allowed their customers considerable freedom to cancel the license as to a percentage of the pictures contracted for.

The plaintiff argues that the Sherman Act forbids block-booking in toto. This is said to be because it is illegal to condition the licensing of one film upon the acceptance of another, and it therefore can make no difference whether the group of films involved in a license be two or forty. In our opinion this contention is sound, and any form of block-booking is illegal by which an exhibitor, in order to obtain a license for one or more films, must accept a license for one or more other films.

A patentee who has granted a license in consideration that the patented invention shall be used by the licensee only with unpatented material furnished by the licensor may not restrain as a contributory infringer one who sells to the licensee like materials for like use. *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680; *Morton Salt Co.* v. *G. S. Suppiger*, 314 U. S. 488, 491; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502; *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458. Moreover, as was said in *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661, 670, a decree for an injunction against a contributory infringer would sanction both "a misuse of the patent privilege and a violation of the anti-trust laws." The same rule would appear to apply to copyrights and prevent a suit for contributory infringement by a copyright owner who had licensed the printing of his book, only in connection with paper supplied by him, against a third party supplying paper to the licensee in violation of the agreement. See *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Straus* v. *Am. Publisher's Ass'n*, 231 U. S. 222.

It is true that a copyrighted motion picture when united with another copyrighted picture by block-booking is not

tied to an uncopyrighted article. Nevertheless the objections to conditioning the licensing of one picture upon the licensing of another are the same, for the result is to give the copyright owner not only the reward which is his due from the licensing of a single copyrighted film, but to extend his monopoly by requiring his licensee to accept one or more other films and to pay royalties therefor as an additional consideration. We cannot see that this differs in principle from requiring the licensee to purchase uncopyrighted articles in connection with the license of a copyright. In either case the copyright owner is obtaining something which the decisions have forbidden as beyond the grant of his limited monopoly. Justice Holmes in his dissenting opinion in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 519, argued persuasively that the right of the owner of a patent to keep his device out of use included the right to condition its use. Such a doctrine would contravene the rule we are laying down, but his views were rejected by the majority of the Supreme Court in that decision, as well as in *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, and have proved to be contrary to a long line of subsequent decisions of that court—indeed to have been supplanted by the general trend of authority ever since the days of *Henry* v. *Dick*, 224 U. S. 1.

It may be argued that the common law gives a right to condition the licensing of one film upon the acceptance of another—that it is as though the owner of ordinary chattels refused to sell a lot to A unless the latter would purchase in a larger quantity than he desired. The question whether such a contract involving patents or copyrights was good at common law was apparently left open in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 503, and *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, and in *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152, the Court of Appeals for the Second Circuit sustained contracts of block-booking.

Block-booking, when the license of any film is conditioned upon taking of other films, is a system which prevents competitors from bidding for single pictures on their individual merits and adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be

taken and exhibited in order to secure the first. It differs from such a sale of chattels as we have mentioned because it extends a monopoly which the owner of the chattels is not assumed to have. We are not inclined to follow *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152 (C.C.A. 2), for the reason we have given and particularly because of recent decisions of the Supreme Court. As Stone, C.J., said in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 459,—When dealing with the use of one patent to exploit another:

> "• • • It [Ethyl Gasoline Corporation] has chosen to exploit its patents by manufacturing the fluid covered by them and by selling that fluid to refiners for use in the manufacture of motor fuel. Such benefits as result from control over the marketing of the treated fuel by the jobbers accrue primarily to the refiners and indirectly to appellant, only in the enjoyment of its monopoly of the fluid secured under another patent. The licensing conditions are thus not used as a means of stimulating the commercial development and financial returns of the patented invention which is licensed, but for the commercial development of the business of the refiners and the exploitation of a second patent monopoly not embraced in the first. The patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly of another, see Standard Sanitary Mfg. Co. v. United States, supra, than for the exploitation of an unpatented article, United Shoe Machinery Co. v. United States, supra; Carbice Corporation v. American Patents Corp., supra; Leitch Manufacturing Co. v. Barber Co., supra; American Lecithin Co. v. Warfield Co., 105 F. 2d 207, or for the exploitation or promotion of a business not embraced within the patent. Interstate Circuit v. United States, supra, 228-230."

See also *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 415, 452-3; *Mercoid Corp.* v. *Mid-Continent Investment Co.*,

320 U. S. 661, 670; *Mercoid Corp.* v. *Minneapolis Honeywell Regulator Co.*, 320 U. S. 680, 684; *United States* v. *Masonite Corp.*, 316 U. S. 265, 277-8; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 227-230; *Stokes & Smith Co.* v. *Transparent-Wrap Machine Corp.*, decided by Second Circuit Court of Appeals May 1, 1946.

We however declare illegal only that aspect of block-booking which makes the licensing of one copyright conditional upon an agreement to accept a license of one or more other copyrights. A distributor may license to an exhibitor at one time as many films as the latter wishes to receive, but the distributor may not constitute groups of pictures which it refuses to license separately. The distributor may of course not license his pictures at all, but if he does license them, he must do so severally and, in accordance with the bidding procedure previously indicated, must license them to the exhibitor or exhibitors who are qualified and offer the best terms for the various runs.

Blind-selling does not appear to be as inherently restrictive of competition as block-booking, although it is capable of some abuse. By this practice a distributor could promise a picture of good quality or of a certain type which when produced might prove to be of poor quality or of another type—a competing distributor meanwhile being unable to market its product and in the end losing its outlets for future pictures. The evidence indicates that trade-shows, which are designed to prevent such blind-selling, are poorly attended by exhibitors. Record pp. 1178-9. Accordingly, exhibitors who choose to obtain their films for exhibition in quantities, need to be protected against burdensome agreements by being given an option to reject a certain percentage of their blind-licensed pictures within a reasonable time after they shall have become available for inspection. Such right of rejection has been incorporated in numerous licenses given by the defendants and should be afforded whenever licenses of unproduced films and films not trade-shown are secured by an exhibitor who has made the best competitive bid for them.

The only group licensing we are prepared to sanction is licensing by which the group is not offered on condition that the licensee shall take all the pictures included in it,

or none, but in which the pictures are separately priced, and each picture is to be sold to the highest duly qualified bidder. As we have already indicated in discussing formula deals, master agreements, and franchises, the offering of pictures should be theatre by theatre, and if more than one picture is included in a license agreement, it will be only because of business convenience and to the extent that each picture so included has received the best bid.

"Pooling" Agreements

It is claimed by plaintiff that the theatre-owning defendants have combined with each other and with independent theatre-owners by "pooling" their theatres through operating agreements, leases, joint stock ownership of theatre-operating corporations, or through joint ownership of theatres in fee. We are asked to determine the validity of these various means of joining interests.

By far the most numerous type of agreement in evidence is that by which given theatres of two or more exhibitors, normally in competition with each other, are operated as a unit or most of their business policies collectively determined by a joint committee, or by one of the exhibitors, and by which profits of the "pooled" theatres are divided among the owners according to pre-agreed percentages. See, *e.g.*, Plaintiff's Exhibits 9, 100, 200, 206, 213, 220-1, 223, 226, 226A, 232. Some of the agreements provide that the parties thereto may not acquire other theatres in the competitive vicinity without first offering them for inclusion in the "pool." See, *e.g.*, Plaintiff's Exhibits 201, 205-6, 219.

These operating agreements we hold to be in clear conflict with the Sherman Act, for through them a defendant-exhibitor reduces to a minimum opposition between its own and other theatres in the "pool". Cooperation, rather than competition, characterizes their operation, and in view of the exhibitor-defendants' financial strength, control of first-class film distribution, ownership of concentrated numbers of first-run theatres, and especially their combination to reduce competition in exhibition through systems of price-fixing and clearances, such restraints as these agreements impose upon free commerce in motion pictures are far less

than reasonable. The result is to eliminate competition *pro tanto* both in exhibition and in distribution of films which would flow almost automatically to the theatres in the earnings of which they have a joint interest.

Other forms of operating agreements are between major defendants and independent exhibitors rather than between major defendants, see, *e.g.*, Plaintiff's Exhibits 97, 118, 208, 238-9, 358, but we are not of the opinion that this renders them legal. The effect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition against theatres not members of the "pool". Even if the parties to such combinations were not major film producers and distributors, but were all wholly independent exhibitors, such agreements might often be regarded as beyond the reasonable limits of restraint allowance under the Sherman Act. This result is certain when some of the parties are of major stature in the movie industry and have in other ways imposed unlawful restraints upon it, as we have found to be the case upon the record before us.

In certain other cases the operating agreements are accomplished by leases of theatres, the rentals being determind by a stipulated percentage of profits earned by the "pooled" theatres, see, *e.g.*, Plaintiff's Exhibits 9, 106, 118, 204. This appears to be but another means of carrying out the illegal objection discussed above. While a theatre-owner may of course remove itself from the business of operating theatres by leasing them to anyone it deems fit upon a fixed rental basis, so long as a monopoly in exhibition is not thereby achieved by the lessee, any arrangement whereby one of the exhibitor-defendants in this case allies its theatres with those of a competing exhibitor, independent or affiliated, and yet itself remains in the trade of exhibiting motion pictures by retaining an interest in the profits earned by the allied theatres, is unlawful under the anti-trust acts.

Many theatres, or the corporations owning them, are held jointly by one or more of the exhibitor-defendants, in some cases in conjunction with independents. See, *e.g.*, Plaintiff's Exhibits 8, 9, 46, 48, 62, 164, 355, 387; RKO's Exhibit 11. As these joint interests enable the major

defendants to operate theatres collectively, rather than competitively, we find them illegal for the reasons above stated. Approximate steps should be taken so that no exhibitor-defendant will own theatres (whether represented by fee, beneficial, or stock interests) jointly with other exhibitor-defendants, regardless of the size of interests involved. Appropriate steps should also be taken so that no exhibitor-defendant or defendants will jointly own a theatre or stock interest therein with any independent exhibitor, except when a defendant or an independent owns an interest of five per cent or less, which we deem *de minimis* and only to be treated as an inconsequential investment in exhibition. See *infra* p. 71. This result may be reached in situations like Florida, Texas, Minnesota and Michigan by a sale, purchase, or exchange of interests in jointly-owned theatres so long as the transaction sought to be achieved will not result in an unreasonable restraint of competition in exhibition within the particular competitive area. To this end the court will control the manner in which rearrangements of these joint interests are effected.

It seems impracticable to do more than lay down general rules as to the foregoing situations. If further details are required to cover specific provisions of the various pooling agreements, they should be set forth in the decree to be hereafter entered.

It should be added that in our opinion there can be no objection to operating, booking, or film buying through agents, provided the agent is not also acting in respect to theatres owned by other exhibitors, independent or affiliated, and provided that in case the agent is buying films for its principal he does this through the bidding system, theatre by theatre.

Discrimination Among Licensees

The amended and supplemental complaint alleges that in licensing films each of the distributor- defendants has discriminated against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits. Of the various contract provisions by which such discriminations are said to have been accomplished, plaintiff sets forth the following in its brief: suspending the terms of a given

contract, if a circuit theatre remains closed for more than eight weeks, and reinstating it without liability upon reopening. Plaintiff's Exhibits 188, 265-6, 383-4, 472-3; allowing large privileges in the selection and elimination of films. Plaintiff's Exhibits 172, 177, 192, 263-6, 383-4, 472; allowing deductions in film rentals if double bills are played, Plaintiff's Exhibits 183-4, 190, 199, 242, 245, 247, 258-9, 262, 264-6, 271-2a, 274, 382-3, 473; granting moveovers and extended runs, Plaintiff's Exhibits 182-2a, 199, 260, 262, 265, 267, 274, 383-4, 474, 476; granting roadshow privileges, Plaintiff's Exhibits 187-8, 199, 232, 265-6, 383-4, 472; allowing overage and undertage, Plaintiff's Exhibits, 190-1, 194, 259, 265-6, 383; granting unlimited playing time, Plaintiff's Exhibits 241, 267, 269, 471; excluding foreign pictures and those of independent producers, Plaintiff's Exhibits 173-4, 181, 190-1, 194, 199, 262, 265-6, 272a, 383-4, 395, 470-2; granting rights to question the classification of features for rental purposes, Plaintiff's Exhibits 187, 232, 259, 265, 472-3; and especially, discriminating in film rentals, clearances, and minimum admission prices, see Plaintiff's Brief pp. 56-70, 75-85.

These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of affiliated and unaffiliated theatres. Record pp. 1432-3; Columbia's Exhibit 9a; Universal's Exhibit 2; Plaintiff's Exhibits 195, 198, 259, 261, 265-6a, 384, 396, 470-3. Small independents are usually licensed, however, upon the standard forms of contract, which do not include them. Record pp. 1432-3; Plaintiff's Exhibits 275-90. The competitive advantages of these provisions are so great that their inclusion in contracts with the larger circuits constitutes an unreasonable discrimination against small competitors in violation of the anti-trust laws. It seems unnecessary to decide whether the record before us justifies a reasonable inference that the distributor-defendants have conspired among themselves to discriminate among their licensees, for each discriminating contract constitutes a conspiracy between the licensee and licensor. *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173.

The defendants argue that these privileges granted to the circuits flow from their negotiations with the individual theatre-owners rather than from a standard policy of discrimination deliberately pursued by them. This is perhaps true, but the result is the same whether the bargaining power of the large exhibitors forces upon the distributors a discriminatory policy, or whether the latter voluntarily carry such a policy into effect. Acquiescence in an unreasonable restraint, as well as the creation of such a restraint, violates the Sherman Act. Under the bidding system we are requiring such discriminations would appear impossible. Those provisions which are not compatible with the operation of this system, or which are inherently unreasonable, such as a provision for clearance between theatres where there is no substantial competition, will no longer be includible in licenses, as mentioned elsewhere, but otherwise the bidders will compete for licensing contracts on a parity, in that the same offer will be made to all prospective exhibitors in a community.

The foregoing is not to be construed, however, as indicating that the distributor-defendants have discriminated among their licensees with respect to film rentals, clearances, or minimum admission prices. They have perhaps done so, but we are without sufficient knowledge of the many factors entering into the determination of these provisions such as the character of specific communities, the nature of the different theatre appointments, of the patrons, operating policies, locations, and responsibility of operators. In the absence of such facts, we are unable to infer that the distributor-defendants have violated the Sherman Act in this particular regard, but any discriminations in the other ways noted above in favor of affiliated licensee of licensees connected with independent circuits as against individual independents must be enjoined, and we believe will not exist in future licenses under the bidding system for which we are providing.

Divestiture of Theatres

We cannot accede to the prayer of the plaintiff that the major defendants should be divested of their theatres in

order that no distributor of motion pictures shall be an exhibitor. Undoubtedly such a step while not *ipso facto* preventing price-fixing agreements or unreasonable clearance would terminate the government's most urgent objections to the present methods of conducting the motion picture business, but it would also withdraw the defendant-distributors from competition in the exhibition field and at the same time would create a new set of theatre owners which would be quite unlikely for some years to give the public as good service as the exhibitors they would have supplanted in view of the latter's demonstrated experience and skill in operating what must be regarded as in general the largest and best equipped theatres. We think that the opportunity of independents to compete under the bidding system for pictures and runs renders such a harsh remedy as complete divestiture unneccessary, at least until the efficiency of that system has been tried and found wanting.

In the year 1945 there were about 18,076 motion picture theatres in the United States of which the five major defendants had interests in 3,137 or 17.35 percent. Of the latter, Paramount or its subsidiaries owned independently of the other defendants 1395—a little less than half, or about 7.72 per cent; Warner 501, or about 2.77 per cent; Loew's 135, or about .74 per cent; Fox 636, or about 3.52 per cent, and RKO 109, or about .60 per cent. There were 361 theatres, or about 2.00 per cent, in which two or more of these defendants had joint interests, whether held directly or indirectly through stock ownership in the same corporation or through a lease or operating agreement. This tabulation excludes theatres connected with one or more of the defendants through film-buying or management contracts or through corporations in which a defendant owns an indirect minority stock interest. It includes all theatres in which each defendant otherwise owns a direct or indirect interest of any amount. See Loew's Exhibit 2; RKO's Exhibit 11; Plaintiff's Exhibits 8, 9, 12-3, 22, 47-8, 64, 87-8, 97, 100, 118-20, 156-64, 360.

It would seem unlikely that theatre owners having aggregate interests of little more than one-sixth of all the theatres in the United States are exercising such a monop-

cly of the motion picture business that they should be subjected to the drastic remedy of complete divestiture in order to affect a proper degree of free competition. It is only in certain localities and not in general that an ownership even of first-run theatres approximating monopoly exists. Under the proposed system the only theatres the competition of which in exhibition even Paramount—the largest owner—would in anywise control are the 7.72 per cent which it now owns. Each of the other four major defendants would control a far smaller percentage of the theatres. Even in places like Philadelphia and Cincinnati, where Warner and RKO have owned all the first-run theatres, their theatre interest cannot properly be aggregated to establish a conspiracy in restraining exhibition, for in such localities there would seem to be nothing to prevent other persons from building theatres of a similar type if the market for the distribution of films should be opened to the highest bidder and the builder of a new theatre could compete with the other theatre owners in obtaining pictures for exhibition in the theatre he had built. The only pictures that the present sole exhibitors in such localities could control would be their own, which they can always exhibit freely in their own theatres.

In about 60 per cent of the 92 cities having populations of over 100,000 on which the government mainly relies to prove its case, there are independent first-run theatres in competition with those of the major defendants except so far as it may be restricted by the trade practices we have criticized.[8] In about 91 per cent of these cities there is competition in first runs between independents and some of the major defendants or among the major defendants themselves, except so far as it may be restricted by the above

[8] According to Loew's Exhibit 13 and RKO's Exhibit 11, there are independent first-run theatres in all but the following 38 cities: Albany, Bridgeport, Charlotte, Chattanooga, Cincinnati, Cleveland, Columbus, Dallas, Dayton, Des Moines, Elizabeth, Erie, Flint, Fort Worth, Grand Rapids, Houston, Jersey City, Kansas City, Mo., Knoxville, Lowell, Memphis, Milwaukee, Minneapolis, Newark, New Haven, Norfolk, Omaha, Paterson, Peoria, Rochester, San Antonio, Scranton, South Bend, Syracuse, Toledo, Wichita, Worcester, Yonkers.

trade practices.[9] If the bidding system we propose to set up, minimum admission prices in licenses eliminated, and the other restrictive agreements which we have discussed terminated, it is our opinion that adequate competition would exist. Indeed in all of the 92 cities, even where there is no present competition in first runs there is always competition in some run.

Moreover, there is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly, as was the case in *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106, and *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. C. A. 2). The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition. They can only be restrained from the unlawful practices in fixing minimum prices, obtaining unreasonable clearances, block-booking, and other things we have criticized.

If in certain localities there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of competitors, their lack of finacial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from "inherent vice" on the part of these defendants. Each defendant had a right to build and to own theatres and to exhibit pictures in them, and it takes greater proof than that each of them possessed great financial strength, many theatres, and exhibited the greater number of first-runs to deprive it of the ordinary rights of ownership. Outside the limits of the trade practices and agreements which we have found to violate the anti-trust laws and which will under the final decree be abolished, there is general competition among all the defendants as well as between them and inde-

[9] Upon the termination of "pooling" agreements a major defendant may control all of the first-run theatres in only the following 8 cities: Charlotte, Chattanooga, Cincinnati, Erie, Knoxville, Peoria, South Bend, Wichita. Loew's Exhibit 13; RKO's Exhibit 11.

pendent distributors for the exhibition of their various pictures. Record p. 1962.

As was said by the expediting court in *United States* v. *The Pullman Company*, 64 F. Supp. 108, 112 (E. D. Pa. 1945):

> "If there is only one store in a town at which every one trades, that fact does not itself constitute a monopoly in the legal sense. It is only when the merchant maintains his position by devices which compel everyone to trade with him exclusively that the situation becomes legally objectionable."

In the case at bar, as we have reiterated, many of the objections are to the trade practices we have alluded to, and not to the ownership of theatres either by the major defendants or by their wholly-owned subsidiaries. If those theatres were all owned by entirely independent corporations the distributing-producing defendants, if not in competition in the distribution of their films, would control competition in the exhibition business by in the aggregate controlling the distribution of most of the best pictures in the United States and imposing restrictions upon their use. The root of the difficulties we have discovered lies not in the ownership of many or most of the best theatres by the producer-distributors, but in price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five major defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited. That such would be the case seems amply demonstrated by the decisions where powerful independent circuits were involved. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208. If the objectionable trade practices were eliminated, the only difference between such an assumed situation in

which the defendants owned no theatres and the present would be the inability of the major defendants to play their own pictures in their own theatres. The precentage of pictures on the market which any of the five major defendants could play in its own theatres would be relatively small and in nowise approximates a monopoly of film exhibition.[10]

There has however been restraint of competition in exhibition by the five major defendants through ownership of theatres jointly with one another or if their interests be more than five per cent even where jointly held with independents which, in our opinion, calls for a divestiture of

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[10] The following table is derived from Plaintiff's Exhibit 426 and Record pp. 2400-1:

FEATURE FILMS RELEASED DURING THE 1943-44 SEASON BY ALL DISTRIBUTORS

	No. of Films	Percentages of Total	
		With "Westerns" included:	With "Westerns" excluded:
Fox	33	8.31%	9.85%
Loew's	31	8.31%	8.85%
Paramount	31	7.81%	9.25%
RKO	38	9.57%	11.34%
Warner	19	4.79%	5.67%
Columbia	41	10.32%	12.24%
United Artists	16	4.04%	4.78%
	No. of Films	Percentages of Total	
		With "Westerns" included:	With "Westerns" excluded:
Universal	49	12.34%	14.63%
Republic	(29 features (30 "Westerns"	14.86%	8.66%
Monogram	(26 features (16 "Westerns"	10.58%	7.76%
PRC	(20 features (16 "Westerns"	9.07%	5.97%
Totals	397	100%	100%
	335 without "Westerns"		

such interests whether such partial interest is in fee or through stock ownership or otherwise.

There is no evidence that in a city such as Cincinnati, in which a major defendant owns all of the first-run theatres, other exhibitors, affiliated or unaffiliated, have been prevented from also owning theatres for exhibition on first-run and there consequently is no monopoly in the legal sense, see *United States v. Pullman Company*, 64 F. Supp. 108, 112, and no reason for directing a divestiture. But when theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. In such case their joining of interests is illegal under the anti-trust laws for the reason that the major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently. Such an elimination of competition is unreasonable in view of the defendant's being a powerful factor in the industry capable of exerting vast influence to its ends, and of the methods it has employed to restrain and control normal competition in distributing and exhibiting motion pictures through price-fixing, system of clearances, block-booking, pooling and the other practices we have alluded to.

We find such joint interests in a great number of theatres, a summary of which is set forth below,[11] and hold that

[11] In so far as information could accurately be obtained from RKO's Exhibit 11, the numbers of theatres jointly owned by the defendants are approximately as follows:

THEATRES JOINTLY OWNED WITH INDEPENDENTS:

Paramount	993
Warner	20
Fox	66
RKO	187
Loew's	21

THEATRES JOINTLY OWNED BY TWO DEFENDANTS:

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25

they must be terminated by a sale to, or purchase from the co-owners or owners, or by a sale to a party not one of the other defendant-exhibitors. The decree or subsequent orders to be entered in conformity with this opinion will control sales or exchanges of such fractional interests for the purpose of restoring or creating a reasonable competition in the areas in question.

General Considerations

It may be said that such restrictions in commercial dealings as we would impose will interfere with the right of a copyright owner to choose his customers or contract for the disposition of his own property. The answer is that no such absolute right exists where its exercise will involve an extension of a copyright monopoly or an unreasonable interference with competition in the distribution and exhibition of moving pictures. A system of fixed admission prices, clearances and block-booking is so restrictive of competition in its tendency that it should be modified to comply with the terms of the Sherman Act. The modifications in practices we have indicated will relieve conditions that have grown up through the years. Indeed the practices are defended on the ground that business convenience and long usage ought

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Paramount-RKO	150
Loew's-RKO	3
Loew's-Warner	5
Fox-RKO	1
Warner-RKO	10
Total	1,501 Theatres

Of the above theatres jointly owned with independents, the following numbers will not be affected by the decree, since the defendant or co-owning independent owns less than a 5% interest:

Paramount	177
RKO	32
Total	209 Theatres

Total affected by the decree according to RKO's Exhibit 11 ..... 1,292 Theatres

to sanction them. But, in spite of their long continuance, we cannot escape the conclusion that in various ways the system stifles competition and violates the law and that business convenience and loyalty to former customers afford a lame excuse for depriving others of rights to compete and for perpetuating unreasonable restrictions. The remedy we are giving against the infractions is certainly no more drastic in effect than the one the Supreme Court granted in *Interstate Circuit* v. *United States*, 306 U. S. 208, nor more severe than the one it imposed in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173. The defendants have built up great business enterprises in a very popular field. Yet they have carried on practices we have found unduly restrictive of interstate commerce and even though we do not suggest that they any more than "those eighteen upon whom the tower in Siloam fell" have been "sinners above all men", yet measures should be taken to restore the moving picture business to a condition of competition that will benefit both competitors and the general public and to abate practices that are unlawful.

It is argued that the steps we have proposed would involve an interference with commercial practices that are generally acceptable and a hazardous attempt on the part of judges—unfamiliar with the details of business—to remodel its delicate adjustments which have hitherto provided the public with what is a new and great art. But we see nothing ruinous in the remedies proposed. Disputes which may arise under the bidding system are likely to relate to questions whether the bidder has a theatre adequate for the run for which he bids, whether the clearance requested is reasonable as regards his own theatre and those of others, and similar matters generally involved in comparing bids. If the defendants will consent to an arbitration system for the determination of such disputes of the kind that has worked so well under the consent decree, they will facilitate the adjustment of most of the differences that are likely to occur, with a large saving of time and money as compared with separate court actions.

A suit in the district court for violation of the Sherman Act is doubtless an awkward way to cure such ills as have

arisen, but it is perhaps the best remedy now available to the government. There surely are evils in the existing system, and the Sherman Act provides a mode of correction which is lawfully invoked. At all events, that which is written is written, and is controlling on us.

It does not follow from the foregoing that we should wholly break up the exhibition business of each of the major defendants even though a "root and branch" decree might be legally possible. Such total divestiture would be injurious to the corporations concerned, and if we are right in our analysis of the situation, we should still have to give relief against price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agreements, and other agreements we have held invalid. The relief proposed we believe should suffice, while total divestiture would be damaging to the public as well as to the defendants and not accomplish any useful purpose at the present time.

The Decree

A decree is granted in accordance with the views expressed in the foregoing opinion to be settled on ten days' notice. It should provide for the dismissal of all claims asserted by the plaintiff against any of the defendants which act only as producers of motion pictures and for the dismissal of claims against any other defendants based on their acts as producers, whether as individuals or in conjunction with others.

The granting of licenses by any of the defendant-distributors which fix minimum prices for admission to theatres either of the defendants or of any other exhibitor should be enjoined in which such minimum admission prices are fixed by the parties either in writing, or through a committee, or through arbitration, or upon the happening of any event, or in any other wise.

The defendants should be enjoined from concertedly agreeing to maintain a system of clearances as among themselves or with other exhibitors, and no clearances should be granted against theatres in substantial competition with the theatre receiving a license for exhibition a

excess of what is reasonably necessary to protect the licensee in the run granted. Existing clearances in excess of what is reasonably necessary to protect the licensees in the runs awarded to them shall be invalid pro tanto. In determining what is a reasonable clearance the following factors should be taken into consideration:

(1) The admission prices of the theatres involved, as set by the exhibitor;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendants from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

The further performance by any of the defendants of existing formula deals, master agreements to the extent that we have previously found them invalid, or franchises should be enjoined and the defendants should also be enjoined from entering into or carrying out any similar agreements in the future.

Defendants owning a legal or equitable interest in theatres of ninety-five per cent or more either directly or through subsidiaries may exhibit pictures of their own or of their wholly owned subsidiaries in such theatres upon such terms as to admission prices and clearances and on such runs as they see fit.

No defendant or its subsidiaries shall exhibit its films other than on its own behalf or through wholly owned subsidiaries, or subsidiaries in which it has an interest of at least ninety-five per cent, without offering the license at a minimum price for any run desired by the operators of each theatre within the competitive area. The license desired shall in such case be granted to the highest responsible bidder having a theatre of a size and equipment adequate to show the picture upon the terms offered. The license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers, or any person whatever. Each license shall be offered and taken theatre by theatre and picture by picture. No contracts for exhibition shall be entered into, or if already outstanding shall be performed, in which the license to exhibit one feature is conditioned upon an agreement of the licensee to take a license of one or more other features, but licenses to exhibit more than one feature may be included in a single instrument provided the licensee shall have had the opportunity to bid for each feature separately and shall have made the best bid for each picture so included. To the extent that any of the pictures have not been trade-shown prior to the granting of a license for more than a single picture, the licensee shall be given by the licensor the right to reject a percentage of such pictures not trade-shown prior to the granting of the license to be fixed by the decree. But that right to reject any picture must be exercised within ten days after there has been an opportunity afforded to the licensee to inspect it.

The defendants shall be enjoined from entering into or continuing to perform existing pooling agreements whereby given theatres of two or more exhibitors, normally in competition, are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee, or by one of the exhibitors, or whereby profits of the "pooled" theatres are divided among the owners according to pre-agreed percentages. They shall also be enjoined from making or continuing to perform agreements that the parties may not require other theatres in the competitive area without first offering them for inclusion in the pool. The making or continuance of leases

of theatres under which defendants lease any of their theatres to another defendant or to an independent operating a theatre in the competitive area in return for a share of the profits shall be enjoined.

Each defendant shall cease and desist from ownership of an interest in any theatre, whether in fee or in stock or otherwise, in conjunction with another defendant-exhibitor. Each defendant shall cease and desist from ownership, jointly with an independent, of an interest in any theatre, greater than five per cent, unless such defendant's interest is ninety-five per cent or more; and where the interest of such defendant is more than five per cent and less than ninety-five per cent, such joint interests shall be dissolved either by a sale to, or by a purchase from, such co-owner or co-owners. Rearrangements of such joint interests with an independent, if by purchase, shall, however, be subject to the direction of this court so that their effectuation may promote competition in the exhibition of motion pictures. Where a defendant owns a ninety-five or greater per cent interest in any theatre, such theatre may be considered as its own so far as this opinion and the decree to be entered hereon are concerned. Each of the defendants shall be enjoined from expanding its theatre holdings except for the purpose of acquiring a co-owner's interest in jointly owned theatres, and this only in cases where the court shall permit such acquisition, instead of requiring an outright sale of the undivided interest of the defendant in question. The foregoing provisions as to divestiture of partial interests in theatres shall apply both to interests held in fee and beneficially and to those represented by shares of stock. But it shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the later case, this court or other competent authority shall approve the acquisition after due application is made therefor.

Each defendant shall be enjoined from operating, booking or film-buying through any agent who is also acting in such matters for any other exhibitor, independent or affiliated.

The decree shall also provide for arbitration of disputes as to bids, clearances, runs, and any other subjects appropriate for arbitration in respect to all parties who may consent to the creation of such tribunals for adjustment of such disputes. It shall also provide for an appeal board generally similar to the one created by the consent decree as to any parties consenting thereto. It shall make such disposition of the provisions of the existing consent decree signed November 30, 1940, as may be necessary in view of the foregoing opinion.

In order to secure compliance with the decree to be entered, duly authorized representatives of the Department of Justice shall on the written request of the Attorney General or the Assistant Attorney General in charge of anti-trust matters, and on reasonable notice to the defendant or defendants affected, be permitted reasonable access to all books and papers of the defendants and reasonable opportunity to interview their officers or employees, as provided in Section XVIII of the Consent Decree.

Proceedings under the decree to be entered shall be stayed pending appeal or for the purpose of enabling the parties to adjust their business without an unfair burden or as practice may require upon such terms as the decree shall provide.

Jurisdiction of this cause shall be retained for the purpose of enabling any of the parties to the decree to apply to the court at any time for such orders or directions as may be necessary or appropriate for the construction or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

Findings should be proposed by the parties for the assistance of the court, but such proposed findings will form no part of the record.

Dated June 11, 1946.

AUGUSTUS N. HAND,
U. S. Circuit Judge.
HENRY W. GODDARD,
U. S. District Judge.
JOHN BRIGHT,
U. S. District Judge.

APPENDIX "B"

UNITED STATES DISTRICT COURT

Southern District of New York

United States of America,

against *Plaintiff,*

Paramount Pictures, Inc., *et al.*,

Defendants.

Memorandum In Re Findings and Decree

In order to meet some of the objections raised at the hearing to the system of bidding for features described in the opinion of the court, we have modified the system there proposed so that competitive bidding will only be necessary within a competitive area and in such an area where it is desired by the exhibitors. In other words, the decree provides an opportunity to bid for any exhibitor in a competitive area who may desire to do so.

The arrangement for arbitration and an appeal board has been terminated except as to unfinished litigations and other matters referred to in the decree, because of the unwillingness of some of the parties to consent to their continuance. Nevertheless, as we have indicated in the opinion, these tribunals have dealt with trade disputes, particularly those as to clearances and runs, with rare efficiency, as both government counsel and counsel for other parties have conceded.

Indeed, the arbitration system set up under the consent decree of November 20, 1940, was created pursuant to the prayer of the amended and supplemental complaint by the United States filed November 14, 1940, in which, among other things, the plaintiff prayed that "a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein."

We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree.

Dated: December 31, 1946.

AUGUSTUS N. HAND,
United States Circuit Judge.
HENRY W. GODDARD,
United States District Judge.
JOHN BRIGHT,
United States District Judge.

APPENDIX "C"

MOTION OF COLUMBIA DEFENDANTS

"Motion Denied.
Feb. 3, 1947.

AUGUSTUS N. HAND U. S. C. J.
HENRY W. GODDARD D. J.
JOHN BRIGHT D. J."

MOTION OF UNITED ARTISTS

"Motion Denied.
Feb. 3, 1947.

AUGUSTUS N. HAND U. S. C. J.
HENRY W. GODDARD D. J.
JOHN BRIGHT D. J."

MOTION OF UNIVERSAL DEFENDANTS

"The within motion is denied.
Feb. 3, 1947.

AUGUSTUS N. HAND U. S. C. J.
HENRY W. GODDARD D. J.
JOHN BRIGHT D. J."

MOTION OF PARAMOUNT, TWENTIETH CENTURY-FOX, LOEW, R. K. O. AND WARNER DEFENDANTS

"Motion denied as to 1, 3 and 4, granted as to 2 (a) and (b) by extending the time of dissolution and termination to

July 1, 1947. To this end, Paragraph III (2) of this decree is modified by adding at the end the following:

"The Pooling agreements by one or more defendants with others not parties to this action which violate this provision shall be dissolved prior to July 1, 1947."

Paragraph III (4) of the decree is modified by adding at the end the following:

"The leases referred to herein between a defendant and independents which violate this provision shall be terminated prior to July 1, 1947."

Settle order on Notice.

Feb. 3, 1947.

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